83-337

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1983

NO._____

MIRIAM L. DEW,

PETITIONER,

VS.

THE CITY OF FLORENCE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF SOUTH CAROLINA

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QUESTIONS PRESENTED FOR REVIEW

1. Did Petitioner have an "expectancy of employment" that amounted to a "property" interest entitled to constitutional due process protection?

2. Was Petitioner denied due process because Respondent failed to comply with the mandates of its own self-imposed procedures?

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OPINION BELOW

The Opinion in Miriam L. Dew v. The City of Florence, Opinion No. 21930, was filed in the South Carolina Supreme Court on May 25, 1983, and is printed in Appendix A hereto.

JURISDICTIONAL STATEMENT

Jurisdiction to entertain the petition for writ of certiorari is founded upon 28 U.S.C.A. 1257(3) as it is claimed that the Petitioner's rights guaranteed by the Fourteenth Amendment of the United States Constitution were violated by the Respondent City of Florence in terminating her employment.

STATUTORY PROVISIONS RELATING TO THE JURISDICTION OF THIS COURT

United States Statutes

Title 28 USC 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional Provisions

Fourteenth Amendment

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

South Carolina Constitution

Article I.

Sec. 3. Privileges and immunities; due process; equal protection of laws.

The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws. (1970) (56) 2684; 1971 (57) 315.)

South Carolina Statutes

1. Chapter 13. Council-Manager Form of Government. Section 5-13-90. Responsibilities of Manager. The Manager shall be

Sec. 8-17-160. Powers of city managers.

(See Full Statute in Appendix)

CITY OF FLORENCE ORDINANCE

STATE OF SOUTH CAROLINA, COUNTY OF FLORENCE, RESOLUTION:

WHEREAS, any modern organization with large numbers of employees needs a clearly written set of rules and regulations; and

WHEREAS, a definite need has existed to revise said rules and regulations to maintain them current and in line with changing times; and

WHEREAS, said revision has now been completed by the City Manager and the necessary changes have been made to the extent that employees presently with the city and those who may be employed in the future will benefit by these rules and regulations; that in opinion of this Council said revision will also assist the city government in the employment of new

personnel when required in the future.
Now, Therefore,

BE IT RESOLVED, by the City Council of the City of Florence that the Personnel Rules and Regulations of the City of Florence and as presented to the City Council with the agenda for the March 27, 1978 meeting, be and they are hereby revised. Be it

FURTHER RESOLVED that a copy be given to each present city employee so that he may be aware of the changes incorporated therein and to future employees to inform them of said benefits.

Adopted this 27 day of March, 1978.

CITY ORDINANCE Promulgating personnel rules and regulations of the City of Florence including formal Grievance Procedures adopted March 27, 1978 pursuant to the Enabling Act of the State Legislature.

(See Verbatim Excerpts from City of Florence Handbook in Appendix)

STATEMENT OF THE CASE

Petitioner, formerly employed as Administrative Assistant to the City Manager of the Respondent City of Florence, brought a declaratory judgment action alleging that she was discharged by the City Manager in violation of her rights under the due process clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution. She based her claim on the further grounds that the Respondent City of Florence had failed to abide by its own self-imposed grievance procedures in discharging her. (Vitarelli doctrine) She asked that her dismissal be declared illegal and that she be awarded damages for lost wages. Initially, she sought reinstatement but later waived this relief. The trial judge ruled in favor of Petitioner, basing his decision on the grounds that the Respondent had failed to comply with its own rules and regulations governing the

removal of employees. Petitioner was awarded damages for lost wages from the time of her dismissal until the time she waived any claim to reinstatement. The trial judge also held that Petitioner was not deprived of a "liberty" interest nor was she possessed of a "property" interest which would entitle her to constitutional due process safeguards. Petitioner did not appeal from the trial court's ruling as to a liberty interest but asserted as an additional sustaining ground on appeal that she had an expectancy of employment amounting to a property interest entitled to due process protection. The South Carolina Supreme Court, in its Opinion filed May 25, 1983, reversed the trial court, holding that Petitioner was only an "at will" employee with no vested "property" interest in continued employment with the City and not entitled to constitutional due process protection.

BACKGROUND FACTS

The South Carolina Legislature passed an enabling Act in 1971 (Section 8-17-110 et. seq. of the 1976 South Carolina Code of Laws) that authorized municipalities to establish by ordinance or resolution employee grievance procedures which, "if adopted, shall conform substantially to the guidelines" established by the Act." On March 27, 1978, the Florence City Council pursuant to the enabling Act promulgated an official Employee Handbook and a formal Grievance Procedure.

The Federal Constitutional question was raised from the outset. In her Amended Complaint dated October 3, 1978, Petitioner specifically alleged that Respondent had violated her right to due process under both the Federal and State Constitutions, specifically alleging that Respondent's procedures did not meet due process requirements as to

notice, a fair hearing, opportunity to cross-examine witnesses, opportunity to confront witnesses, right to have the effective assistance of counsel, and the right to have an impartial judge; that Petitioner did not have notice of the specific charges against her; that the City Manager improperly acted as the final judge of his own actions in dismissing Petitioner even when the Grievance Committee entered a decision in her favor; and that the City Manager acted improperly when he ratified his own acts and decisions when his acts and decisions constituted the essence of Petitioner's grievance.

The Federal constitutional question was addressed continuously throughout the trial, and exhaustive briefs arguing the Federal constitutional questions were submitted to the trial judge after the trial. The trial judge addressed the Federal

constitutional questions at length in his final Order. His entire forty (40) page Order focused almost exclusively on (1) the Federal constitutional principles relating to expectancy of employment giving rise to liberty and property interests entitled to constitutional due process protection and (2) the constitutional due process requirements applicable to public agencies and entities which fail to observe and follow their own self-imposed regulations and procedures. (The Vitarelli Doctine, see Vitarelli v. Seaton, 359 U.S. 535, 539-540)

In the appeal to the South Carolina Supreme Court, Petitioner urged and relied on two grounds: The issue of expectancy of employment creating a property interest entitled to constitutional due process protections and the due process requirement that public entities abide by their own self-imposed regulations and procedures. The South Carolina Supreme Court rejected both of these grounds, holding that Petitioner was an at-will employee who did not have an expectancy of employment amounting to a property

interest entitled to constitutional due process protection.

The South Carolina Supreme Court based its judgment on statutory construction grounds. It decided that since there were no "property" interests entitled to constitutional due process protections involved, there were no due process violations in the grievance procedure that she could rely on to establish her case. It did not recognize any Vitarelli constraints as applying in this case, holding that they were not necessary since she was "victorious" before the Grievance Committee. The Court cited the provision in the grievance procedure provisions in the handbook that: "If however, the City Manager rejects the decision of the Committee, he shall make his own decision and that decision

shall be final..." In this case the City Manager was an impermissible judge of his own prosecution. It is submitted, however, that where as here, Respondent flagrantly failed to follow its own self-imposed procedures, the court "need not consider Petitioner's other arguments. Such a defect renders an adverse personnel action void ab initio". Athas v. United States, 597 F. 2d 722 (1979), citing as standing for the same proposition Vitarelli v. Seaton, 359 U.S. 535; Service v. Dulles,354 U.S. 363; Jones v. United States, 203 Ct. Cl. 544 (1974); McKamey v. United States, 198 Ct. Cl. 28, 458 F. 2d 47 (1972).

The enabling statute (Section 8-17-110 of the 1976 S. C. Code of Laws, as amended), enacted in 1971, provided that municipalities could by ordinance or resolution adopt a grievance procedure which, "if adopted, shall conform substantially to the guidelines" established by the Act.

On March 27, 1978, the Respondent Florence City Council pursuant to the enabling Act passed an ordinance establishing a formal Grievance Procedure covering City employees.

HISTORY OF PETITIONER'S GRIEVANCE

Petitioner began work with the Respondent in January, 1975 and was promoted to Administrative Assistant to the City Manager in July, 1977. All of her fitness reports as an employee of Respondent were above average or superior.

On July 28, 1978, the City Manager terminated Petitioner's employment, basing his action on five generally stated grounds: that she was indiscreet, insubordinate, defied his warnings, misrepresented facts about his decisions, and did not properly support or cooperate with him. Petitioner disputed these charges

and insisted that the difference between her and the City Manager were based on misunderstandings and second-hand gossip.

On August 2, 1978, Petitioner appealed her dismissal to the Grievance Committee, and on August 9, 1978, the Grievance Committee held a hearing.

On August 29, 1978, the City Manager overrode the decision and recommendations of the Grievance Committtee and notified Petitioner that her dismissal would stand. Thereafter, Petitioner brought this action for a Declaratory Judgment and incidental damages.

Petitioner's Petition to the Grievance Committee asserted that the City Manager had not complied with "enacted termination policies and procedures" and had only informed Petitioner in general terms of the grounds for her discharge.

DUE PROCESS VIOLATIONS

At the hearing the Grievance Committee would not permit Petitioner or her counsel in the hearing room when the City Manager and witnesses presented by him were testifying against her.

Petitioner's attorney asked that he and Petitioner be allowed to be present and to hear and cross-examine these witnesses. This request was denied.

Further, Petitioner was not informed by the City Manager or the Grievance Committee of the particulars of the charges against her and did not know what to rebut or explain.

Finally, the City Manager, who had dismissed Petitioner and testified against her and presented the witnesses against her, acted as judge of Petitioner's grievance appeal and reversed the decision of the Grievance Committee.

> and 'property'. The Court 'has placed great emphasis both on making it possible for those who deal with the government in any way to rely on any clearly announced rules, and also on reducing the helplessness of persons who are in a dependent relationship to government with respect to basic needs.' Tribe, American Constitutional Law, 515-16 (1977)."

The State of South Carolina enacted a statute that heightened Petitioner's "expectancy of employment". It authorized municipalities to establish employees' grievance procedures and provided (Section 8-17-130) that: "The presiding officer shall have control of the proceedings. He shall take whatever action is necessary to insure an equitable, orderly, and expeditious hearing."

Bishop v. Wood held that "a property interest in employment can, of course, be created by ordinance, or by an implied contract" and cited Perry v. Sindermann, supra, that a "person's interest in a benefit is a 'property' interest for due process purposes if there are...rules or mutually explicit

understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

These principles find their realization in the South Carolina Legislature's enabling Act, in the ordinance passed by the Florence City Council pursuant to this enabling statute, and in the City of Florence Employee Handbook and grievance procedure that were promulgated by Respondent.

The Court in Bishop v. Wood, supra, referred to the State law of North Carolina in determining the extent of the property interest involved in Bishop v. Wood:

> "The North Carolina Supreme Court has held that enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee. Still v. Lance, 182 S.E. 2d 403. Whether such a guarantee has been given can be determined only by an examination of the particular

> statute or ordinance in question. In North Carolina, nothing else appearing, a contract of employment which contains no provision for the duration or termination of employment is terminable at the will of either party, irrespective of equality of performance by the other party. By statute, G.S. Section 115-142(b), a county board of education in North Carolina may terminate the employment of a teacher at the end of the school year without filing charges or giving its reasons for such termination, or granting the teacher an opportunity to be heard. Still v. Lance, supra."

The dissenting opinions of Mr. Justice White, along with Justice Brenan, Marshall and Blackmon, point up clearly that the employee in Marion, North Carolina, seeking relief in Bishop, had much less of a "property interest" or "employment expectancy" than an employee of the City of Florence has. The North Carolina District Court, in its opinion, said: "It is clear from Article II, Section 6, of the City's Personnel Ordinance, that the dismissal of an employee does not require a notice of a hearing. Upon request of the discharged employee, he should be given written notice of his discharge, setting forth the effective date and

the reasons for the discharge. It does not appear that both the City Ordinance and the State law have been complied with." 377 F. Supp. 501, 504.

In marked contrast the City of Florence Ordinance and the grievance procedure thereunder provide for a warning procedure "before terminations are made." Section 5.3 provides for that "a permanent employee who receives a regular summary year-end evaluation of 'unsatisfactory' must be terminated subject to procedures outlined in the Disciplinary Action Section."

The 1971 enactment by the South Carolina Legislature of an employment grievance procedure created a totally different expectancy from that which obtained in Marion, North Carolina.

As to the principle enunciated in Bishop v. Wood, that "a property interest

in employment can be created by ordinance or by an implied contract, the Florence City Council on March 28, 1978, passed the ordinance setting up the employee grievance procedure, under authority of the enabling Act of the South Carolina Legislature. These enactments confirm the substantial development of South Carolina law in the area of employment security, particularly where public employees are concerned.

The "implied contract" question must be examined through the eyes of Bishop v. Wood.

The ordinance adopted on March 27, 1978, recites that "any modern organization with large numbers of employees needs a clearly written set of rules and regulations. (The words "rules and regulations" echo the criteria language of Bishop v. Wood, citing Sindermann: A "person's interest in a benefit is 'property' interest for due process if there are...rules or mutually explicit understandings

that support his claim of entitlement to the benefit and that he may invoke at a hearing.")

Continuing to quote from the ordinance: "A definite need has existed to revise said rules and regulations to maintain them current in line with changing times..." (In Bishop v. Wood, the Court observes that "only a stagnant society remains unchanged"... Continuing to quote from the resolution: "That a copy be given to each present City employee so that he may be aware of the changes incorporated therein and to future employees to inform them of said benefits." These are more than just words; they are promises that create an "expectancy of employment" -- the expectancy of security in employment."

In the concluding section of the Employee Handbook, entitled "A Final Note," the City of Florence stresses the reciprocal nature of the responsibilities

that employer and employee have toward each other. These reciprocal obligations and the expectancies they create constitute an "implied contract" between the employer and employee - an expectancy that he will not be discharged except for cause. Such job security is a property right he is entitled to enforce.

A FINAL NOTE

The information in this booklet is extensive and should give an employee a good understanding of his responsibilities and the responsibilities of the City of Florence, as well as City policies and procedures. From time to time new administrative and personnel policies may be developed. Copies of these policies will be sent to all Supervisors, Division and Department Managers when they are issued and these supervisors and managers will be responsible for keeping all employees so informed.

This booklet should be kept in a special place for future reference. If there are questions regarding anything contained herein, Supervisors, Department or Division Managers should be consulted.

CONFLICT

These rules and regulations shall supplement and supersede all previous rules and regulations relating to the same subject. All conflicting rules and regulations are hereby repealed.

We now consider specific provisions of the City and State law to see whether they operate to make Petitioner's employment rights "property" rights within the meaning of Bishop v. Wood. On Page 8 of the City of Florence Handbook, we find "agreement" provisions that bear on this question: "YOUR EMPLOYER'S RESPONSIBILITIES TO YOU...

"5. Security in employment..." (Emphasis added)

Other provisions that meet the "implied contract" criterion in Bishop are" "YOUR RESPONSIBILITIES TO YOUR EMPLOYER...

"As your employer, the City of Florence expects you to be: 1...2... 3...4... 5... 6... 7..." (Seven separate provisions) (See Full text in Appendix.)

When the employer's responsibilities to the employee are compared with the

employee's responsibilites to the employer that are set forth on the next page of the Employee Handbook we see that another Bishop v. Wood criterion is applicable: that "a person's interest in a benefit is a 'property' interest for due process purposes if there are...rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

Section 4 of the City of Florence Employee Handbook covers permanent and part-time or temporary status and spells out the benefits and advantages of permanent status and points out explicitly that until a person has passed a six months probation period (extended to nine months in certain instances), "he may be terminated at any time during the probationary period with no redress to the Grievance Committee."

Immediately following this sentence is a parenthetical insert that says "however see

Warning on page 27". Section 10.2 Warning, on page 27, describes in detail the procedures that must be followed when an employee's performance comes into question, including counseling, the requirement that written "summaries" be made of such counseling incidents and held for reference in preparing the probational or regular service evaluation. The Warning Section requires that when a person's performance does not meet certain standards, the employee will "be notified of this eventuality at least three months before the evaluation is due... The person-to-person notification will be confirmed with a written Warning Notice, the original of which shall be handed to the employee concerned, one copy, signed by the employee, retained by the Division Manager, and one copy, signed by the employee, placed in the employee's personnel folder. The Warning Notice will inform the employee

specifically of the following:... "Five things that the employee will be informed about include: "That the employee has an opportunity to improve."

Section 4.2, Permanent Status, provides that "employees who have satisfactorily completed at least six months of continuous service with the City shall be granted permanent status. Permanent employees are entitled to all benefits and privileges provided in the following chapters of this policy." (Emphasis added)

Section 5.2 of Employee Evaluation provides: "Unsatisfactory Regular Service Evaluation -- A permanent employee who receives a regular summary year-end evaluation of 'unsatisfactory' must be terminated subject to procedures outlined in the Disciplinary Action Section." (Emphasis added)

Before enumerating other significant provisions contained in the City of Florence Handbook, some reference should be made to Section 4.7 of Section 4, Job Tenure Not Established, which provides: "Nothing contained in

this title shall be deemed to confer any vested right in employment upon any City employee." (Emphasis added) It is axiomatic that the provisions of a contract or similar document must be construed as a whole and separate provisions must be construed in the light of the other provisions contained in the contract. In view of numerous affirmative promises the City of Florence Handbook makes to employees, this 19-word provision could hardly be given a construction that would totally negate the explicit protective provisions granted City employees. If such an exclusion clause was contained in an insurance contract and the other provisions of the contract promised a variety of benefits to the beneficiary, the "reservation" provision, absent explicitly supporting and clarifying language, would not be construed to deny the policyholder the benefits promised by other, specific provisions of

> the length of continuous service to the City, according to the following schedule."... "During the period of recall rights, employees may be recalled to duty in the reverse order in which they were laid off. No new employees may be hired into any classification while there are employees with recall rights in lay-off status who were laid off from that classification." (Emphasis added)

This list of employee expectations, security in employment, seniority, lay-off in reverse order of seniority, and rehire in order of seniority, reflects modern conditions and prevailing trends. The fact that "mutual" obligations of employer and employees are spelled out in a City of Florence Employee Handbook is an indication of how interconnected all sectors our society have become in thought and practice. Economic security is a consideration of no small concern to people who have to pay their bills each week and cannot reasonably

enter into long-term mortgages and other long-term contracts unless they feel secure in their employment and know that they cannot be discharged for insubstantial reasons.

The provisions of the City of Florence Handbook must be construed as a whole. They were enacted to achieve various political, governmental, and economic objectives and benefits for the City as well as its employees. The City of Florence cannot now disparage the affirmative provisions of an explicitly reciprocal document by pointing to a single generally worded escape clause that, if literally construed apart from the other provisions of the contract, would deny the employees their most valuable economic asset - job security.

QUESTION TWO

Was Petitioner denied due process because Respondent failed to comply with the mandates of its own self-imposed procedures?

Various self-imposed procedural requirements are binding on Respondent in this case. The South Carolina statute (Section 8-17-130) mandates the "presiding officer" to "take whatever action is necessary to insure an equitable, orderly, and expeditious hearing." The Employee Handbook, promulgated pursuant to a duly enacted ordinance of the City of Florence, spells out in detail the reciprocal rights and duties granted to and imposed upon the employer and its employees in the area of employment rights and security and in terminating employees.

The United States Supreme Court in Vitarelli v. Seaton, Secretary of Interior, 359 U.S. 535, 3 L. Ed. 2d 1012, and a series of related cases held that even gratuitous procedures, not required by Constitution or statute, once they are promulgated or provided

by regulations, are binding on administrators.

Raoul Berger, in "Do Regulations Really Bind Regulators?," Volume 62, Number 2, Northwestern University Law Review, 1967, summarizes the law in the Vitarelli area: "That regulations have 'the force and effect of law' has been often stated and never questioned. (Citations) They are the product of the 'rule making' power, the delegated legislative power, albeit only a power 'to fill up the details.' It is because of the exercise of 'delegated authority' that a regulation is 'of the same force as if made by the legislature,' 'as though prescribed in terms by the statute.'"

Under a section that Mr. Berger entitled "Due Process and Compliance with Regulations," he states: "It is now time to consider the impact of a trio of recent

Supreme Court decisions upon administrative compliance with procedural regulations. In all three, Accardi v. Shaughnessy, 347, U.S. 260, Service v. Dulles, 354 U.S. 363, and Vitarelli v. Seaton, 359 U.S. 535, the regulations were gratuitous, not required by constitution or statute, and in all three it was held that the regulations 'bound' the administrators. The 'rationale of the decisions,' say Professors Gellhorn and Byse:

> Seems to be either that the existing regulations have 'the force and effect of law' and must, therefore, be deemed binding on the Government, as well as on the citizen, or that they embody a de facto recognition of minimum standards of procedural decency and may, therefore, be roughly equated with due process." (Citations)
>
> Under our system, the law binds all, officers, as well as citizens, 'from the highest to the lowest.' Compliance with a regulation that has 'the force of law' moreover, is required by due process in its primal sense; i.e., a regulation, like a statute, is a part of 'the law of the land' which must be observed by an official for the protection of a citizen. (Citations)

The Respondent City of Florence in the Resolution setting up its grievance procedure pursuant to the enabling legislation explicitly stated that it was adopting "a clearly written set of rules and regulations" needed by any modern organization and that those rules and regulations "will also assist the City Government in the employment of new personnel when required in the future."

The City of Florence promised that an employee could expect from the City of Florence: "Fair treatment at all times and security in employment." (Page 8, Employees Handbook)

The full extent of the due process violation in this case is shown in brief excerpts from the testimony of the three principal actors in the case: Petitioner, the City Manager, and the Chairman of the Grievance Committee:

"Miriam Dew: (Tr. 41, Appendix
Q. When we appeared at the hearing, was any request made about appearing when witnesses were called and cross-examined? A. Yes. Well, you requested that and Mr. Jeffords pointed out that that was not our standard procedure; that only on one other occasion did he recall when an attorney had appeared in behalf of a person who had filed a grievance and that although you were welcome to be there with me, at the time that witnesses appeared that we were asked to leave, and that was the standard procedure.

Q. After the city's witnesses were called, (and had been excused), did they permit you to come in, you and your attorney? A. Yes.

Q. Was any request again repeated for an opportunity to examine these witnesses? A.Yes, at that time you requested it.

Q. Were any of the witnesses ever produced for cross-examination? A. No. We didn't even know who they were except the ones we saw who came out through the city manager's office. There was another door, apparently.

William Jeffords, Chairman of Grievance Committee: (Tr. 96
Q. And after Mr. Edwards came in, did he present various witnesses? A. Yes.

Q. Were either Miss Dew or I present? A. No

Q. Was our presence permitted by you all's established procedure? A. No
Q. Was there any, so to speak, notice or verbatim specification given to Miss Dew or to me of what these witnesses testified to specifically? A. Not that I know of.

Q. Did I give you a lawyer's memorandum stating my various views on the constitutional procedures prior to the committee and discuss it with you? A. You discussed it with me, I don't remember any memorandum.

Q. And, were you informed that cross-examination was a constitutional procedure and the right to confront the witnesses? A. I was informed of that but I didn't necessarily think it was true.

Thomas Edwards, City Manager:
(Tr. 259,

Q. What did you (the City Manager) tell the committee? A. I basically recapped and presenting the witnesses, their testimony, letting them testify to their knowledge, and presented one witness related to organizational structure as more or less a qualified person to so testify to support my position as far as the role of an administrative assistant, their relationship to the manager, and used my own comments in summarizing and pointing out those items that had occurred and the reasons for dismissal.

Q. And you, of course, again recommended dismissal or reaffirmed your statement of dismissal. A. I was there to certainly defend the position of the city manager's office in dismissing her and presented giving what we had to the best of our ability to present to the grievance committee.

Q. And you appeared there in the position of an adversary to Miss Dew. A. Adversary, not knowing how you meant it, I appeared to present our case. If that's an adversary, yes.

Q. And trying to get the grievance committee to affirm your termination? A. I'm not sure if you're reading anything into it, but on a simple type statement, yes.

(Tr. 261)
Q. Were you aware of any conflict of interest, any conflict of roles? A. I was not aware of any. I was aware of the fact that we were operating as far as we could tell, basically to the letter of the State Code and the Codes of the City of Florence, or ordinances or policies of the City of Florence.

Q. Did you actually present the witnesses and ask them questions? A. Yes Sir.

Q. Did you make any closing statement to the committee as to what you thought their action should be? A. I certainly made a summary statement and as my opening remarks reflected, they were in a very difficult position, that I understood their position, and certainly felt that they had a difficult decision to make and certainly do it without regard to the fact that I was city manager of the City of Florence.

Q. Was any notice given to Miss Dew of which witnesses were being presented as they were brought in? A. No, sir.

Q. Was Miss Dew or anybody representing her, an attorney, in the committee room to cross-examine any of these witnesses? A. No sir.

Q. And did she have any assistance of counsel during that stage of the proceeding? A....No, sir.

Q. And, of course, she obviously was not there to confront the witnesses herself, personally, and test their credibility, was she? A. Correct.

Q. In the preliminary process of terminating Miss Dew, did you consider yourself bound by or constrained by the provisions of the employee handbook? Z. As interpreted, yes.

Q. I believe under Section 9.4, page 25, (employees) may be dismissed, I'm leaving some others out, by the city manager. And in that same or immediately -- Chapter 10, Section 10, disciplinary action, which follows the authority of the city manager to terminate, there is a disciplinary action section 10.0. Did you feel yourself subject to those provisions? A. As interpreted, yes.

Q. Going to 10.2 as to warnings, did you feel yourself bound by the provisions there as to warnings to an employee about to be terminated? A. As interpreted and upon the advice of the city attorney, yes.

The State of South Carolina subscribes to a standard definition of "due process". State Ex Rel. Southern Railway v. Earle, 66 S. C. 194, annotated under the South Carolina Constitution, Article I, Section 3, relating to due process.

In its opinion, The South Carolina Supreme Court disparaged Petitioner's complaints of due process violations for the reason that she was "victorious" before the Committee; that it was analogous to an accused person being found not guilty appealing from his not guilty verdict, alleging the trial was not fair.

This view overlooks the peculiar interplay of the factors in this case. If the City Manager who also acted as prosecutor is, as the final arbiter of Petitioner's rights, to have any possibility of judging Petitioner's appeal in a fair and unbiased manner, he must permit Petitioner to explain or rebut the evidence against her so that those explanations and rebuttals can operate on his judgmental processes as arbiter.

The importance of the Grievance Committee procedure in this case was not the decision qua decision but its function as "process" - an informing, and, from Petitioner's standpoint, hopefully a tranforming process. Petitioner could hardly expect to transform the City Manager's attitude the way the hearing was conducted.

The South Carolina Supreme Court cited Section 5-13-90 of the State law relating to the responsibilities of the City Manager:..."he shall (1) Appoint and, when necessary for the good of the municipality, remove any appointive officer or employee of the municipality (Emphasis added by the Court.) and fix the salaries of such officers and employees, except as otherwise provided in this Chapter or prohibited by law ...(Emphasis added by Petitioner.) The Court also relied on the fact that the Employee Handbook permitted the City Manager to reject the decision of

implied contract the power of the City Manager to fire without cause. South Carolina recognizes the existence of "implied agreements". Sloan v. Whitlock,13 Rich. 177 (1861).

Although Section 8-17-140 of the 1976 South Carolina Code of Laws, authorizes the City Manager to reject the decision of the Grievance Committee and make an independent final decision, it should not be necessary to a decision in this case to decide the effect of that particular provision, inasmuch as the failure of Respondent to accord Petitioner her due process rights and its failure to comply with its own regulations operate to make its attempt to terminate her employment a nullity ab initio. This rule was cited in Athas v. United States, 597 F. 2d 722 (1979), citing as standing for the same proposition Vitarelli v. Seaton,359 US 535; Service v. Dulles,354 US 363; Jones v. United States, 203 Ct. Cl. 544 (1974), McKamey v. United States,198 Ct. Cl. 28, 458 F. 2d 47 (1972).

Considering that Respondent flagrantly deprived Petitioner of fundamental due process rights - including exclusion from the hearing room while the witnesses against her were testifying - she in fact had no hearing in the due process sense. The South Carolina Supreme Court glossed over these due process violations, holding that she had no property right entitled to constitutional due process protection.

Logan v. Zimmermann Bruck Co., 455 U.S. 422 (1982), addressed the question of the effect of the existence of State procedures on Federal due process cases:

> "Each of our due process cases has recognized, either explicitly or implicitly, that because 'minimum (procedural) requirements (are) a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the pre-conditions to adverse official action.' Vitek v. Jones,445 US 480 (1980)... Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. The Court has considered and rejected such an approach. "'While the legislature may elect not to confer a

> property interest,...it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards... (T)he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms'." Vitek v. Jones, 445 US at 490-491, N. 6, quoting Arnett v.Kennedy,416 US at 167.

THE TRIAL JUDGE ON VITARELLI AND DUE PROCESS ISSUES:

The trial judge, having ruled that Petitioner did not have a liberty or property interest entitled to constitutional protection, held that the City had not complied with its own self-imposed rules. Pertinent portions of his scholarly Order will be quoted at length. (Commencing at Page 26 of Order dated May 23, 1980).

...While the City of Florence is not required to afford procedural due process absent a constitutionally protected "liberty" or "property" interest, the City is bound by its rules. This obligation to comply with established rules applies even if the rules specify procedural safeguards which equal or

exceed those mandated by the Constitution. Service v. Dulles, supra; Vitarelli v. Seaton, supra. The quoted provisions of the Employee Handbook clearly reveal that a fair and equitable hearing before an impartial decision maker is contemplated. These promises of fairness and impartiality must be considered as a recognition of minimum standards of procedural decency, which may be equated with due process. See, Robbins v. U.S.R.R. Retirement Board, 594 F. 2d 448 (5th Cir. 1979).

The questions involved here, then, are, first, what procedural protections are required in the context of this case, and, second, was the process afforded Petitioner sufficient to satisfy the required procedural protection.

...The contours of due process are determined by taking into account "the individual's stake in the decision at issue as well as the state's interest in a particular procedure for making it." Hortonville Joint School District v.

Hortonville Education Association, 426 U.S. 482, 494 (1976).

...While the process which is due is determined by balancing the competing interests of the individual and the state, certain elements or ingredients are regarded as the bulwarks of due process, and have, therefore, been considered essentially invariable when the protections of due process are applicable. In Greene v. McElroy, 360 U.S. 474, 496 (1959), the Supreme Court stressed the critical nature of the right to confront and test adverse witnesses:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

The Fourth Circuit Court of Appeals has noted that in almost every instance where the termination decision turns on the truth or falsity of disputed facts due process requires an opportunity to confront and cross-examine

adverse witnesses. Thomas v. Ward, 529 F. 2d at 919; McNeil v. Butz, 480 F. 2d. 314, 321 (4th Cir. 1973)....Finally, courts have identified the elements which constitute minimum procedural due process. These elements include: (1) Notice and specification of the charges, (2) opportunity to be heard, (3) opportunity to confront accusers, and (4) an impartial tribunal. Morrisey v. Brewer, 408 U.S. 471, 488-89 (1972).

...Here, there is no critical government interest involved. Nor is the City's interest in performing its responsibilities effectively and efficiently threatened by affording Petitioner minimum due process at the post termination grievance hearing. At the time of the hearing, Petitioner was not employed by the City and was, therefore, no longer an obstacle, if ever she was, to the implementation of the City Manager's plans or the efficient operation of the

City Manager's office. At best, the City's interest is in minimizing the administrative burden imposed upon it by affording Petitioner minimum due process. But this is the very burden the City gratuitously accepted, when it promised its employees "fair and impartial treatment" of grievance and "fair and equitable hearings." The City of Florence Employee Handbook, Grievance Procedure, pp. 37-38. What the Fourth Circuit Court of Appeals said in a case involving the dismissal of two government employees is apposite here:

> (W)e conclude that the relative natures of the government function and the private interests do not permit the government to discharge these employees without providing notice and a hearing at which the employees can confront and cross-examine the government's informers. In both cases, the propriety of dismissal hinged strictly on factual determination, and the evidence consisted primarily of individual testimony. Thus, these dismissals arise in a context where confrontation and cross-examination are paradigmatically useful in discovering the truth....We do not dispute that the government has a substantial interest in the efficient and orderly discharge of unsatisfactory employees. But this interest does not outweigh the employee's interest in

> having an effective opportunity to challenge damning evidence.... Despite its concern for the efficient discharge of derelict employees, the Department of Agriculture has created considerable procedural burdens for itself, even in cases such as these which involve non-civil service employees....The government expends considerable effort to provide a semblence of due process: notice, hearing, appeal. It is evident that this system already occasions considerable governmental inconvenience. The incremental physical burden of presenting the accusing witnesses for cross-examination upon the employee's timely and good faith request would neither be crippling nor add a significant additional burden....

McNeill v. Butz, supra, 480 F. 2d at 322-23. Similarly, in this case, there is no indication that the City's interest outweighed Petitioner's interest in being notified of the case against her and in having an effective opportunity to be heard and to challenge the evidence against her. The City's interest does not excuse it, in meeting its obligation to afford "fair and equitable hearings," from affording the Petitioner the traditional elements of a due process hearing.

...As a general rule, for notice to be constitutionally adequate, it must apprise the person, who is to be affected by the government action, of the charges against him in such specifics and at such time as to permit meaningful preparation of a response. In Re Ruffalo, 390 U.S. 544, 550, 88 S. Ct. 1222, 1225-26. ...One such guideline, applicable here, is that excessively general charges are insufficient to satisfy due process. In In Re Gault,supra, for example, the Supreme Court found a general charge of "delinquency" to be constitutionally inadequate.

Here, the only notice of the charges against Petitioner was contained in the letter of termination from the City Manager to Petitioner. The grounds for her dismissal as set forth in the termination letter are as follows: "(1) Not making an effort to use proper discretion in the City Manager's office. (2) Not supporting and cooperating with the City Manager. (3) Insubordination. (4) Misrepresenting facts concerning the City Manager's decisions. (5) Defying warnings from the

City Manager." To a large extent, these charges were founded upon information supplied to the City Manager by other City employees and a newspaper reporter. The identity of these individuals and the substance of their allegations relied upon by the City Manager in discharging Petitioner were not revealed to Petitioner until the trial before this Court, so that Petitioner was, in effect, precluded from marshalling evidence in preparing her case so as to benefit from the grievance hearing. Therefore, even under the malleable due process standard, the notice of the grounds for Petitioner's termination was inadequate.

The basic rule regarding opportunity to be heard is that it be presented at "a meaningful time and in a meaningful manner." Armstrong v. Manzo,380 U.S. 545, 552 85 S.Ct. 1187, 1191, 14 L. Ed. 2d 62, 66 (1965); Grannis v. Ordean,234 U.S. 385,

34 S. Ct. 779, 58 L.Ed. 1363 (1914). It is true that in this Petitioner was afforded an opportunity to appear at the grievance hearing. The question, however, is whether during her appearing before the Grievance Committee, she was given an opportunity to present a case in her defense. The record revealed that Petitioner and her attorney were the first to be called before the Grievance Committee, but it is silent as to how this phase of the hearing was conducted. One thing is clear however. Any case that Petitioner was able to present was made with no more information as to the case against her than was provided by the generally worded grounds given for her dismissal in the July 28, 1978 letter of termination. Petitioner did not even have the benefit of such notice as she would have received from hearing the presentation of the City Manager's case against her, since she and her attorney were excluded from the hearing room during that time. Such insufficient notice of the specific charges against Petitioner deprived

her of an adequate opportunity to be heard. What the Pennsylvania Court said in Mellon v. Travelers Insurance Company is apposite here.

> Notice and the opportunity to be heard are essential elements of a fair hearing....Litigants require not simply notice that a hearing is to occur, but also notice of the issues to be litigated. The principal function of pleadings, even in their shortened, modern form, is to focus the litigants' attention on issues so that they may marshal their evidence and prepare their arguments. Thus notice is integrally linked to the right to be heard, for without notice, litigants are ill-equipped to assert their rights and defend against claims. Here, appellants were denied their right to notice, and so their right to be heard....Consequently, they never marshalled such evidence nor prepared such arguments as they might have had against the claims.

The Fourth Circuit Court of Appeals has given specific guidance on the extent of the right of confrontation in a case involving termination of public employment. McNeill v. Butz, supra, Satterfield v. Edenton-Chowan Board of Education, supra,

> on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.

It is the conclusion of this Court that the City's procedures which failed to provide Petitioner adequate notice and effective opportunity to be heard and an opportunity to confront her accusers did not afford "fair and equitable treatment" of her grievance or "fair and impartial hearings" or "(f)air treatment at all times" as promised in the City of Florence Employee Handbook.

Besides neglecting to follow its own rules regarding the grievance procedure, the City of Florence failed to comply with its regulations relating to disciplinary action as set forth in Section 10.2 of the Employee Handbook. Section 10.2 has been quoted at length in an earlier section of this Order.

...The Defendants might argue that since Petitioner had oral notice and clearly understood her position, non-compliance with Section 10.2 was harmless. Such an argument would be wide of the mark, since the Accardi-Service-Vitarelli doctrine demands "scrupulous" observance of even gratuitously promulgated rules and regulations. See e.g., Vitarelli v. Seaton, supra, 359 U.S. at 540, 79 S.Ct. at 973.

It is the conclusion of this Court that the City of Florence has failed to comply with its own regulations and procedures as set forth in Section 10.2 and 10.3 of the City of Florence Employee Handbook. Therefore, Petitioner's dismissal was "illegal and of no effect." Vitarelli v. Seaton, supra, 359 U.S. at 544, 79 S. Ct. at 975.

The direct involvement and prosecutorial participation of the City Manager in the flagrant violations of Petitioner's due process rights makes the City Manager's actions as judge reviewing the decision of the Grievance Committee constitutionally impermissible. His concurrence in the exclusion of Petitioner from the hearing when he and the witnesses he presented and examined were testifying against her evidences a fatally biased mind-set. The "rule of necessity" doctrine is not applicable under the circumstances in this case where the proceedings involve formal grievance procedures, quasi-judicial in nature, established pursuant to statutory enabling legislation mandating "an equitable...hearing".

The dissenting opinion in Hortonville Dist. v. Hortonville Ed. Assoc., 426 U.S. 482 (1976), notes that "It is now well established that 'a biased decision-maker (is) constitutionally unacceptable (and) "our system of law

has always endeavored to prevent even the probability of unfairness."'" Withrow v. Larkin, 421 U.S. 35, 47, quoting In Re Murchison, 349 U.S. 133. "In order to ascertain whether there is a constitutionally unacceptable danger of partiality, both the nature of the particular decision and the interest of the decisionmaker in its outcome must be examined."

The Court in Withrow makes the point that is specifically applicable to the City Manager as adjudicator in the instant case: "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' (Citations) In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases

are those in which... (the adjudicator) has been the target of personal abuse or criticism from the party before him." In his termination letter the City Manager charged that Petitioner was "insubordinate", "defied his warnings", misrepresented facts about his decisions", and did not properly support or cooperate with him.

Phillips v. Board of Fire & Police Comm'rs of E. St. Louis, 24 Ill, App. 3d 242, 320, N.E. 2d 355, in holding that there can never be a merger of the prosecutorial and judicial function in an administrative body exercising quasi-judicial functions, cited the following authority:

> "In Gardner v. Repasky, 434 Pa. 126, 252 A. 2d 704 (1961), a case involving the discharge of a policeman, the Supreme Court of Pennsylvania said at page 706: 'We held in Schlesinger Appeal, 404 Pa. 584, 172 A.2d 835 (1961), that where a prosecutor and judge were combined in one body, the accused was denied a fair hearing to which due process of law entitled him.'"
>
> "See also Donnon v. Civil Service Commission, 3 Pa. Cmwlth. 366, 283 A.2d 92. The gist of all this authority is that never, ever, can there be a merger of the prosecutorial and judicial functions in a court or in an administrative body

exercising quasi-judicial functions."

CONCLUSION

The Vitarelli doctrine is available as an alternate method of protecting employees' rights (due process, employment, or contractual), given substantial "connections" with enabling acts, ordinances, official handbooks and formal grievance procedures, even where, as determined by the United States Supreme Court, an employee's expectancy of employment under State law does not amount to a "property" right.

An employee, such as the Petitioner in this case, is not without redress under the United States Constitution, where her due process rights as in this case have been flagrantly violated.

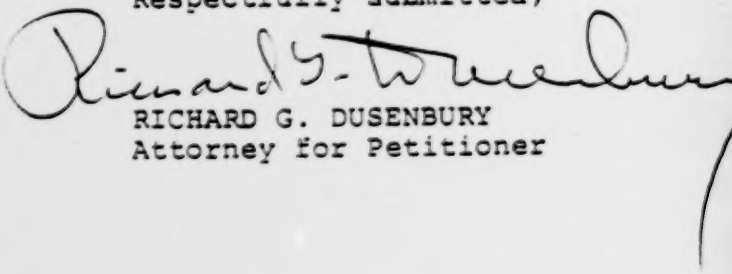
It should be noted that Petitioner brought a Declaratory Judgment action in

State Court; the lower Court found judgment for Petitioner and granted relief; the Supreme Court reversed and, in effect, denied Petitioner any relief under State law.

It is submitted that Petitioner (1) had a property interest entitled to constitutional protection; (2) that Respondent violated its own self-imposed procedural requirements; (3) that Respondent violated Petitioner's due process rights under the South Carolina and United States Constitution and, therefore, its actions (the City Manager's decision) is a nullity and void ab initio, without having to reach the issue of the inherent or statutory authority of the City Manager to dismiss for the "good of the municipality" (without cause).

For the foregoing reasons this Honorable Court should grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,



RICHARD G. DUSENBURY
Attorney for Petitioner

APPENDIX A

THE STATE OF SOUTH CAROLINA

In the Supreme Court

Miriam L. Dew,.....Respondent-Appellant,

v.

The City of Florence,...Appellant-Respondent.

Appeal from Florence County

George F. Coleman, Judge

Opinion No. 21930

Filed May 25, 1983

REVERSED

James R. Bell, of Florence, for appellant-respondent.

Richard G. Dusenbury, of Florence, for respondent-appellant.

LITTLEJOHN, A.J.: This is an appeal from a declaratory judgment action brought under the provisions of §15-53-10 of the Code of Laws of South Carolina (1976), as

amended. Plaintiff-Respondent, Miriam L. Dew (Dew) alleged that her employment had been wrongfully terminated by the Florence City Manager, Thomas W. Edwards (City Manager). The trial court, sitting without a jury, ruled in favor of Dew. The city appeals; we reverse.

Dew began work with the City in January of 1975. She was promoted to administrative assistant to the City Manager in July of 1977. The current City Manager was appointed a few months later.

Dew's duties as administrative assistant to the City Manager initially included the dual function of personnel director and administrative assistant. In January of 1978, the City hired a personnel manager, leaving Dew as administrative assistant only. The newly appointed personnel manager later assumed the title of Personnel Director and began reporting directly to the City Manager rather than to Dew. It was at this point that communica-

tions between Dew and the City Manager began to break down.

On May 26, 1978, a new pay plan was adopted by the City. In accordance with this new plan Dew, who anticipated a salary increase, found her position reduced from a "Grade 16" to a "Grade 13". Her salary remained the same. The position of Personnel Director was elevated from a "Grade 16" to a "Grade 17" with a thirty-five per cent (35%) salary increase. According to Dew's testimony, she was so "frustrated" and "demoralized" by what she considered to be a demotion that she had to leave work early that day.

The following Monday, both the City Manager and Dew expressed their doubts as to whether she could continue as his assistant. Subsequent events lead the City Manager to prepare a letter of "severe warning" on May 31 to Dew indicating that her actions over the last several days would not be tolerated and if she persisted upon

her present course she would be terminated. After some discussion of the letter, the City Manager apologized and destroyed the warning letter and its carbon copy believing the problem had been resolved.

Between May 31, and July 18, 1978, at least two high-level city employees informed the City Manager that they had overheard Dew making comments critical of the new pay plan and of the City Manager in public areas in the presence of other employees. Also, during this time a newspaper reporter for the Florence EXAMINER approached the City Manager with "pencil and paper in hand" seeking a story about the new pay plan. She stated she had heard it was unfair to employees. At the meeting between the City Manager and the reporter, the reporter disclosed that the source of her information about the new pay plan was Dew.

On July 18, 1978, the City Manager called Dew to his office to discuss "some concerns he had." At this meeting, the

Dear Miss Dew:

Effective immediately, you are hereby dismissed from the employment of the City of Florence. This dismissal follows your lack of effort to use proper discretion as an employee f the City Manager's Office, lack of support of and cooperation with the City Manager, insubordination, misrepresentation of facts concerning decisions of the City Manager, defiance of repeated warnings from the City Manager that your actions are unacceptable. These items were discussed with you on May 29, 1978, in an attempt to resolve this situation and again discussed with you on May 30, 1978, and May 31, 1978. Subsequently a review of the matter was conducted with you on July 18, 1978. Since July 18, 1978, I have carefully deliberated the matter and regretfully reached a decision of your dismissal since repeated attempts

to gain your cooperation have failed and your defiance has continued.

Dew, in the court action before us, alleged that she would recover damages in the form of lost wages on two theories:

1. The procedures by which she was terminated did not afford her procedural due process; and

2. The procedures affecting her discharge did not comply with termination rules and regulations promulgated by the City.

By her first contention, Dew asserts the City denied her procedural due process by failing to afford her adequate notice of the charges against her or a hearing comporting with the minimum requirements guaranteed by the Fourteenth Amendment to tne United States.

Section 8-17-110 et. seq. of the Code of Laws of South Carolina (1976), as amended, establishes guidelines for employee grievance procedures for counties

and municipalities which elect to utilize such procedures. The act is designed to establish uniform procedures for the resolution of grievances of employees arising out of their employment. Pursuant to these code sections, the City of Florence promulgated rules and published a "City of Florence Employee Handbook". The handbook provides for the appointment of a Grievance Committee to hear complaints of employees who allege wrongful termination.

Dew appealed her termination to this committee. By a vote of five to four, it recommended that she be reinstated. The committee's action is not final and the City Manager is designated as the reviewing authority under both the statute and the handbook. As reviewing authority, he overruled the Grievance Committee. In so doing, he exercised an authority given to him by §5-13-90 of the state law, which reads as follows:

Responsibilities of manager.

The manager shall be the chief executive officer and head of the administrative branch of the municipal government. He shall be responsible to the municipal council for the proper administration of all affairs of the municipality and to that end, subject to the provisions of this chapter, he shall:

(1) Appoint and, when necessary for the good of the municipality, remove any appointive officer or employee of the municipality and fix the salaries of such officers and employees, except as otherwise provided in this chapter or prohibited by law and except as he may authorize the head of a department or office to appoint and remove subordinates in such department or office; (Emphasis added.)

The damages awarded Dew were to compensate for lost wages for the City's

failure to comply with its termination procedures as established in its handbook. The decision was based on: (1) The City Manager's failure to strictly comply with the "Warnings" provision of the handbook; (2) A finding that Dew received inadequate notice of the specific charges against her; and (3) A finding that Dew was denied the right to appear while testimony was presented against her and the right to cross-examine the witnesses.

Her contention would have substantial appeal except for the fact that she was victorious before the committee as is shown by its decision in her favor. Her position is analogous to that of an accused person who is found not guilty but who, nevertheless, appeals, alleging the trial wasn't fair. While the committee might have given her a greater majority of the votes, it could not have given her a more favorable result. In view of the several conferences referred to above and the termination letter, it can hardly be argued that she was unaware of the

true cause of her dismissal.

In addition to the authority given to the City Manager under the Code section quoted above, the handbook itself provides as follows:

> The Grievance Committee, after having heard the testimony and after having evaluated all the facts at hand, shall vote to recommend whatever corrective measures are deemed advisable.
>
> The Committee shall, within twenty days after hearing an appeal, make its findings and decision and report such findings and decision to the City Manager.
>
> If the City Manager approves, the decision of the Grievance Committee shall be final, and copies of the decision shall be transmitted by the Committee to the employee, to the City Manager and to the particular Division Manager involved. If

> however, the City Manager rejects the decision of the Committee, he shall make his own decision and that decision shall be final, with copies transmitted to the employee and the employing agency. (Emphasis added.)

It is obvious that the ultimate authority to discharge, as indicated in the handbook, and specifically delegated in the statute, is in the City Manager. Under the facts and circumstances of this case, failure of the City Manager to technically comply with the handbook regulation is not an irregularity effecting the ultimate result. The relationship between the City Manager and his administrative assistant is necessarily a close one requiring the ultimate in confidence. From a review of the whole of the record, it is obvious that the discharge was a referred to in the statute". . . necessary for the good of the municipality, . . ."

Having disposed of the City's appeal, we now reach the appeal of Dew, whereby she

argues as additional sustaining grounds that the trial court erred in finding that she had no "property" interest in her continued employment with the City. This contention is without merit.

Both the constitution of the United States and of South Carolina require notice and a hearing comporting with due process if Dew could show that she had a "property" interest in continued employment. See, e.g. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d. 548 (1972); and Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d. 570 (1972).

Where a "property" interest is alleged to have been created, the sufficiency of the claim of entitlement is determined by reference to state law. Bishop v. Wood, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d. 684 (1976).

Section 4.7 of the City of Florence Employee Handbook entitled "Job Tenure Not Established" states, "Nothing in

this title shall be deemed to confer any vested right in employment upon any City employee."

Section 9.4 of the Handbook, entitled "Dismissal" states in part, "Any employee may be dismissed or suspended by . . . the City Manager."

South Carolina Code §5-13-90, quoted above, allows the City Manager in a council-manager form of government to dismiss any City employee "for the good of the minicipality".

Nothing in the record indicates Dew was under contract with the City. In light of unambiguous language of the Employee Handbook and §5-13-90, it is clear that Dew was an "at will" employee with no vested "property" interest in continued employment with the City.

Cf., Rhodes v. Smith, 273 S.C. 43, 254 S.E.2d. 49 (1979): Bane v. City of Columbia, 480 F.Supp. 34 (D.S.C. 1979); and Bunting v. City of Columbia, 639 F.2d. 1090

(1981).

REVERSED.

LEWIS, C.J., NESS, GREGORY and HARWELL, JJ., concur.

APPENDIX B

Order of Judge George G. Coleman, dated May 23, 1980. (Section order addressed to question of Petitioner's "Liberty" interest is omitted.)

Order. The Plaintiff, formerly employed by the City of Florence as the Administrative Assistant to the City Manager, claims in this declaratory judgment action (Section 15-53-10, et seq. of the 1976 South Carolina Code of Laws) that she was discharged by the City in violation of her rights under the due process clauses of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution and under the rules and regulations governing the termination of City employees contained in the City of Florence Employee Handbook. She seeks a judgment declaring that her dismissal was illegal, damages for lost salary and her costs incurred in bringing this action. Initially, the Plaintiff sought reinstatement to her employment with the City

of Florence, but she has since waived this remedy. The Defendants have denied that the Plaintiff's termination was improper and that the City of Florence failed to comply with its rules and regulations governing the removal of its employees. I find that the Plaintiff was not deprived of a "liberty"interest or possessed of a "property" interest which would entitle her to invoke the constitutional safeguards of due process. I find, however, that the Plaintiff's termination was wrongful in that the City of Florence failed to comply with its rules and regulations governing the removal of the Plaintiff and, therefore, the Plaintiff must prevail.

Facts. The Plaintiff, Miriam L. Dew, was employed by the City of Florence for approximately three and a half years. She was hired in January, 1975 as a staff assistant to the Urban Development Division Director, Clifford Rudd. She became

attitude changed and she exhibited resentment toward the personnel department and its director, Mrs. Stankus. Whatever attitude change the Plaintiff may have experienced during this period did not affect the performance of her duties as evidenced by the Plaintiff's regular employee performance evaluation conducted by Mr. Edwards on February 14, 1978. The lowest rating received by the Plaintiff on her evaluation report, which rated her performance in the categories of knowledge, dependability, quantity of work output and cooperation with other employees, was "above average."

The first significant difficulties between the Plaintiff and Mr. Edwards arose when a new pay plan was released on Friday, May 26, 1978. The Plaintiff testified that the City Manager had previously indicated to her that she was being underpaid for the job she was performing and when the new pay plan was developed he would see that her position

was reclassified and her salary "got up to where it ought to be." The Plaintiff, who then anticipated a salary increase, discovered upon the publication of the new pay plan that her salary remained the same and her position was reduced from a Grade 16 to a Grade 13. Under the new pay plan, Mrs. Stankus received a thirty-five per cent (35%) salary increase and her position as personnel director was elevated from a Grade 16 to a Grade 17. According to the Plaintiff's testimony, she was so "frustrated" and "demoralized" by what she considered to be a demotion that she had to leave work early that day.

The following Monday, May 29, 1978, the Plaintiff "buzzed" the City Manager and requested to speak with him about her position and the reason it was being downgraded. It is uncertain what

comments the Plaintiff made in expressing her frustration and disappointment, but it is clear that they caused the City Manager sufficient concern so that he questioned her ability as his administrative assistant to continue to support him and his policies. The Plaintiff expressed to the City Manager her own doubts whether she could continue as the City Manager's administrative assistant and stated that if she could not, she would resign. Mr. Edwards instructed the Plaintiff to think about it over night and inform him of her decision the next day. The following day, Tuesday, May 30, 1978, the Plaintiff advised the City Manager that she could continue as his administrative assistant. The City Manager testified that he did not contemplate terminating the Plaintiff over this incident and that he believed on Tuesday, May 30, 1978, their differences had been resolved. No formal reprimand was issued. The next day, Wednesday, May 31, 1978, the City Manager received a note from the

Plaintiff which was attached to a bill for membership in the IMCA (International City Manager's Association). The note stated: "I don't see any point in spending money for this -- at least where I'm concerned. I imagine Dorene (Stankus, the personnel director) should have this." The City Manager regarded the note as a further expression by the Plaintiff of her resentment and displeasure with the new pay plan. The City Manager prepared a letter of "severe warning" to the Plaintiff indicating that the Plaintiff's actions of the last several days would not be tolerated and if she persisted upon her present course, she would have to be terminated. The same day, Wednesday, May 31, 1978, the Plaintiff was called to the City Manager's office where she was handed her note and the City Manager's letter and Mr. Edwards

orally reviewed the events and attitude of the Plaintiff which precipitated the letter of warning. The Plaintiff responded that the City Manager had misinterpreted the note and explained she had declined the IMCA membership since Mrs. Stankus' position was more important than hers and there was a policy in effect that year to cut back on unnecessary dues, memberships and other extra expenses in the City Manager's office. After some discussion, the City Manager apologized and destroyed the letter of warning and its carbon copy, again believing that the problem had been resolved.

Between May 31, 1978, and July 18, 1978, at least two City employees informed the City Manager that they had overheard the Plaintiff making comments critical of the new pay plan and the City Manager in open, public areas in the presence of other employees. Also during this time a newspaper reporter for the Florence Examiner, Jeannie Griffin, approached the City Manager with "pencil and

paper in hand" seeking a story about the new pay plan, which she stated she had heard was unfair to employees. At the meeting between the City Manager and Ms. Griffin, Ms. Griffin disclosed to the City Manager, after he had guessed, that the source of her information about the pay plan was the Plaintiff. On July 18, 1978, the City Manager called the Plaintiff to his office to discuss "some concerns he had." At this meeting, the City Manager informed the Plaintiff that he had heard that she was publicly criticizing the pay plan and emphasized that her comments could have an adverse impact on its success. The City Manager related to the Plaintiff his feeling that the confidential relationship between them was eroding so that he could no longer confide in her. He told the Plaintiff that this was the last time he would tolerate her undermining of the City Manager's

office and misrepresentation of fact about the new pay plan. The Plaintiff claimed, as she did throughout the trial before this Court, that she had not discussed the pay plan with anyone other than close personal friends and then only about how the plan affected her position. The Plaintiff asked the City Manager if she was terminated, to which the City Manager replied "no, but that she would be" if she continued as she had been. As with the other meetings between the Plaintiff and the City Manager, no written summaries of their discussion were made or retained.

Approximately a week later, on July 25 or 26, 1978, the Plaintiff and Jeannie Griffin had lunch together. At the time, Ms. Griffin was between jobs, starting in a week at another newspaper, the Florence Morning News, where she hoped to report city and county news as she had at the Examiner. Although there is some conflict in the record as to what comments were made by the Plaintiff

to Ms. Griffin during lunch, Ms. Griffin reported to the City Manager, "out of her concern for the City," that the Plaintiff had criticized the City organization and had made statements that the City Manager was "unsuitable" for his position and had been unfair to her. That night on July 25, 1978, the City Manager decided to terminate the Plaintiff.

On July 26, 1978, the City Manager informed the Plaintiff of his decision to discharge her and offered her the opportunity to resign. She requested that she be allowed to consider her decision over night and on the following day, July 27, 1978, the Plaintiff declined to resign. The Plaintiff asked that her termination not be made effective until Friday, July 28, 1978, so that she could complete a project for the City upon which she had been working for some time. On July 28, 1978, the Plaintiff was terminated and given the

following letter of termination:

"Dear Miss Dew:

> Effective immediately you are hereby dismissed from the employment of the City of Florence. The dismissal follows your lack of effort to use proper discretion as an employee of the City Manager's Office, lack of support of and cooperation with the City Manager, insubordination, misrepresentation of facts concerning decisions of the City Manager, defiance of repeated warnings from the City Manager that your actions are unacceptable. These items were discussed with you on May 29, 1978, in an attempt to resolve this situation and again discussed with you on May 30, 1978, and May 31, 1978. Subsequently a review of the matter was conducted with you on July 18, 1978. Since July 18, 1978, I have carefully deliberated the matter and regretfully reached a decision of your dismissal since repeated attempts to gain your cooperation have failed and your defiance has continued.

At the time of the Plaintiff's dismissal, the City personnel policies were contained in the "City of Florence Employee Handbook". The "City of Florence Employee Handbook" provides for an employee grievance procedure, which was adopted under the authority of Sections 8-17-110 et seq. of the 1976 South Carolina Code of Lawd. The sections of the Handbook concerning the employee grievance

procedure, as well as other sections relevant to this action, are quoted at some length later in this Order.

Following her dismissal, the Plaintiff filed a timely grievance. Attached to her Petition was a legal memorandum indicating that the Plaintiff would be represented by counsel and that she wanted an opportunity to confront and cross-examine the witnesses against her. The Grievance Committee's standard procedure did not allow confrontation and cross-examination of witnesses, so the Plaintiff's request was denied. At the grievance hearing on August 9, 1978, the Plaintiff and her attorney were the first to appear before the Grievance Committee. The Plaintiff was required to present her case with no more notice and specification of the charges against her than was supplied by the July 28, 1978 letter

of termination. After presenting her case, the Plaintiff and her attorney were instructed to leave the hearing room. The City Manager then presented his case in support of the Plaintiff's termination by presenting and examining witnesses and by submitting to the Committee a letter from Jeannie Griffin reporting comments allegedly made by the Plaintiff concerning the pay plan and City Manager. After the City Manager concluded the presentation of his case, the Plaintiff and her attorney were recalled to the hearing room to answer questions from the Committee members. At no time before or during the grievance hearing was the Plaintiff or her attorney informed of the identity of the witnesses against her or the substance of their allegations relied upon by the City Manager in discharging the Plaintiff.

The Grievance Committee voted 5 to 4 to reinstate the Plaintiff. The City Manager rejected the Grievance Committee's recommendation of reinstatement and, by letter

dated August 29, 1978, informed the Plaintiff that her termination would "stand."

The Plaintiff's challenge to the Defendant's action is two pronged. She contends that her discharge by the Defendants was unlawful in that: (1) the procedures by which she was terminated did not afford her procedural due process, and (2) the procedures effecting her discharge did not comply with termination rules and regulations promulgated by the City of Florence.

By her first contention, the Plaintiff asserts that the City of Florence denied her procedureal due process by failing to afford her notice and a hearing comporting with the minimum requirements of due process guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 3

of the South Carolina Constitution. But, for constitutional procedural safeguards to apply in a case such as this, the Plaintiff must show the City's decision to terminate her deprived her of a "liberty" or "property" interest encompassed within the protections of due process. See, Board of Regents v. Roth, 408 U.S. 564, Perry v. Sindermann, 408 U.S. 593,599. Therefore, while the Plaintiff's attack upon the Defendants' actions in terminating her employment is two pronged, it presents four critical issues. These issues are:

(1) Was the Plaintiff deprived, by the City of Florence, of an interest in "liberty" which is protected by the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution?

(2) Did the Plaintiff have a "property" interest in her employment with the City of Florence which is protected by the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution?

(3) If the Plaintiff was deprived of an interest in "liberty" by the City and/or possessed a "property"

interest in her continuing employment with the City of Florence, was she afforded procedural due process?

(4) Did the City of Florence fail to comply with its own rules and regulations which govern the termination of the Plaintiff's employment?

These issues are separately discussed in the sections of this Order which follow.

(The portion of Judge Coleman's Order relating to Petitioner's "Liberty" interest has been omitted since it was a completely separate and self-contained section of the Order that does not relate to any other portion of the Order or the questions presented.)

Property Interest. Even if the Plaintiff was not deprived of an interest in "liberty" she is entitled to notice and a hearing comporting with due process if she can show that she had a "property" interest in continued employment with the City of Florence. Board of Regents v. Roth, supra, 408 U.S. at 576; Perry v.

Sindermann, supra, 408 U.S. at 599.

Just as the concept of "liberty" is broader than mere freedom from bodily restraint, the concept of "property" extends well beyond actual ownership of real estate, chattels or money. See e.g., Connell v. Higginbotham, 403 U.S. 207, 208; Bell v. Burson, 402 U.S. 535; Goldberg v. Kelly, 397 U.S. 254. In the two companion cases of Board of Regents v. Roth and Perry v. Sindermann, the Supreme Court gave some definition to the term "property" in the context of public employment. Roth is particularly helpful in identifying the parameters of due process "property." In that case, the Supreme Court said:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Board of Regents v. Roth, supra, 408 U.S. at 577. Also in Roth the Supreme Court cited

several cases from which it said "[c]ertain attributes of 'property' interests protected by procedural due process emerge." Board of Regents v. Roth, supra, 408 U.S. at 577. These cases help flesh out the definition of due process "property." The Court summarized the "property" interest involved in these cases as follows:

> Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. Goldberg v. Kelly, 397 U.S. 254.
>
> See Fleming v. Nestor, 363 U.S. 603, 611. Similarly, in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, Slochower v. Board of Education, 350 U.S. 551, and college professors and staff members dismissed during the terms of their contracts, Wieman v. Updegraff, 344 U.S. 183, have interests in continued employment that are safeguarded by due process. Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing

or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. Connell v. Higginbotham, 403 U.S. 207, 208.

15. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, is a related case. There, the petitioner was a lawyer who had been refused admission to practice before the Board of Tax Appeals. The Board had "published rules for admission of persons entitled to practice before it, by which attorneys at law admitted to courts of the United States and the states, and the District of Columbia, as well as certified public accountants duly qualified under the law of any state or the District are made eligible. . . . The rules further provide that the Board may in its discretion deny admission to any applicant, or suspend or disbar any person after admission." Id., at 119, 46 S.Ct., at 216. The Board denied admission to the petitioner under its discretionary power, without a prior hearing and a statement of the reasons for the denial. Although this Court disposed of the case on other grounds, it stated, in an opinion by Mr. Chief Justice Taft, that the existence of the Board's eligibility rules gave the petitioner an interest and claim to practice before the Board to which procedural due process requirements applied. It said that the Board's discretionary power "must be construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice,

> hearing and opportunity to answer for the applicant as would constitute due process." Id., at 123, 46 S.Ct., at 217.

Board of Regents v. Roth, supra, 408 U.S. at 576-77.

A due process "property" interest in employment can be created by something less formal than a state statute or written contract. In Roth, the Supreme Court made this plain, stating that "property" interests did not have to be founded upon formal contractual or tenure rights, and, instead could be grounded in "rules of understandings that secure certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth, supra, 408 U.S. at 577. This portion was further refined in Perry v. Sindermann where the Court emphasized that:

> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a

> hearing. . . . [A]bsence of . . . an explicit contractual [tenure] provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied." 3A. Corbin on Contracts §§ 561-572 A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." Id., at § 562. And, "[t]he meaning of [the promisor's words and acts is found by relating them to the usage of the past." Ibid. A teacher like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service -- and from other relevant facts -- that he has a legitimate claim of entitlement to job tenure. Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may aupplement a collective-bargaining agreement . . ., so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. . . . We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the institution."

Perry v. Sindermann, supra, 408 U.S. at 601-603. Thus, courts have held that

"property" interests may be created by statute, implied contract, ordinance, employee handbooks, personnel rules and regulations or be implicit in the overall workings of a particular government employer. See e.g., Paige v. Harris, 584 F. 2d 178 (7th Cir. 1978); Ventetuolo v. Burke, 506 F. 2d 476 (1st Cir. 1979); Young v. Brashears, 560 F. 2d 1337 (7th Cir. 1977); Thomas v. Ward, 529 F. 2d 916 (4th Cir. 1975); Kelly v. Action for Boston Community Development, Inc., 419 F. Supp. 511 (D. Mass. 1976); Gerrin v. Hickey, 464 F. Supp. 276 (D. Ark. 1979); Webster v. Redmond, 443 F. Supp. 670 (D. Ill. 1977); Gilbreath v. East Arkansas Planning and Development District, Inc., 471 F. Supp. 912 (D. Ark. 1979); Hickey v. New Castle County of State of Delaware, 428 F. Supp. 606 (D. Del. 1977);

Morris v. City of Kokomo, 381 N.E. 2d 510 (Ind. App. 1978); Lynch v. Gontarg, 386 A. 2d 184 (R.I. 1978); Gausert v. Meeks, 384 N.E. 2d 1140 (Ind. App. 1979).

However, a "property" interest is alleged to have been created, the sufficiency of the claim of entitlement must be determined by reference to state law. Bishop v. Wood, supra, 426 U.S. at 344. The plaintiff here points to the County and Municipal Employees Grievance Procedure Act (hereinafter referred to as the Act), Sections 8-17-110 et seq. of the 1976 South Carolina Code of Laws, and the City of Florence grievance procedure, established under the authority of the Act and adopted by the City of Florence in an ordinance passed on March 27, 1978, as comprising the "skeleton and most of the flesh of state law in the area of employment security" for public employees. Plaintiff's "Supplementary Legal Memorandum," August 10, 1979, p. 1. It is her contention that the South Carolina

legislature's passage of the Act "is an unmistakalbe declaration by this State that State and Municipal employees in South Carolina, covered by the employee grievance procedure act . . ., are protected from discharge except for cause." Plaintiff's "Legal Memorandum," August 9, 1979, pp. 8-9.

It appears well stated that if the Plaintiff could not be discharged by the City except for cause, she possessed a "property" interest in her employment. See, Hickey v. New Castle County of State of Delaware, 428 F. Supp. 606, 609 (D. Del. 1977); Hayes v. City of Wilmington, 451 F. Supp. 696 (D. Del. 1978); Hawkins v. Board of Public Education in Wilmington, 468 F. Supp. 201 (D. Del. 1979); Davis v. Civil Service Commission of the County of Los Angeles, 155 Cal. Rptr. 650, 93 Cal. App. 3d 417 (1979); Gorham v.

City of Kansas City, 225 Kan. 369, 590 P. 2d 1051 (1979); State ex rel. Sweikert v. Briare, 588 P. 2d 542 (Nevada 1978); Williams v. County of Los Angeles, 150 Cal. Rptr. 475, 586 P. 2d 956 (1978); Mendoza v. Regents of University of California, 144 Cal. Rptr. 117, 121, 78 Cal. App. 3d 168, 175 (1978); State ex rel. Warzynlak v. Grenchick, 379 N.E. 2d 997 (Ind. 1978); Alello v. City of Wilmington, 426 F. Supp. 1272 (D. Del. 1976); Skelly v. State Personnel Board, 124 Cal. Rptr. 14, 15 Cal. App. 3d 194, 539 P. 2d 774 (1975); Will v. City of Herington, 201 Kan. 627, 443 P. 2d 667 (1968); Gary Teachers Union, Local No. 4, A.F.T. v. School City of Gary, 332 N.E. 2d 256, 259 (Ind. 1975); Roberts v. City of Tucson, 593 P. 2d 645 (Ariz. 1979); Whitaker v. Board of Higher Ed. of City of New York, 461 F. Supp. 99 (D. N.Y. 1978); Berg v. Claytor, 436 F. Supp. 76 (D.D.C. 1977); City of Flagstaff v. Superior Court In and For Coconino County, 569 P 2d 812 (Ariz. 1977);

Diluigi v. Mier, 430 F. Supp. 1098 (D. Pa. 1977); Faulkner v. North Carolina Dept. of Corrections, 428 F. Supp. 100 (D.N.C. 1977); Appeal of Sergent, 49 Ohio Misc. 36, 3 O.O. 3d 308, 360 N.E. 2d 761 (Ohio Com. Pl. 1976); Kennedy v. Robb, 547 F. 2d 408 (8th Cir. 1976); Olshock v. Village of Skokie, 541 F. 2d 1254 (7th Cir. 1976); Sartin v. City of Columbus Utilities Commission, 421 F. Supp. 393 (D. Miss. 1976); Jacobs v. Kunes, 541 F. 2d 222 (9th Cir. 1976); Thurston v. Dekle, 531 F. 2d 1264 (5th Cir. 1976); Thomas v. Ward, 529 F. 2d 916 (4th Cir. 1975); contra, Sumler v. City of Winston-Salem, 448 F. Supp. 519 530 (D.N.C. 1978); see also, Banks v. Redevelopment Authority of City of Philadelphia, 416 F. Supp. 72, 73 (D. Pa. 1976). Her argument, however, collapses upon its foundation. Section 5-13-90 of the 1976 Code, which was enacted by the

legislature subsequent to the enactment of the County and Municipal Employees Grievance Procedure Act (Sections 8-17-110 et seq. of the 1976 Code) and which specifically provides for the removal of city employees in the council-manager form of municiapl government, provides only for "at will" employment of city employees. Bane v. City of Columbia, 480 F. Supp. 34, 37-38 (D.S.C. 1979). Section 5-13-90 reads:

> The manager shall be the chief executive officer and head of the administrative branch of the municipal government. He shall be responsible to the municipal council for the proper administration of all affairs of the municipality and to that end, subject to the provisions of this chapter, he shall: (1) Appoint and, when necessary for the good of the municipality, remove any appointive officer or employee of the municipality . . . and except as he may authorize the head of a department or office to appoint and remove subordinates in such department or office. . . . (Emphasis supplied).

"At will" employment fails to meet the due process standard of "an enforceable expectation of continued public employment." Bane v. City of Columbia, supra, 480 F. Supp.

at 37-8. Unless the statutory scheme is modified in some way, a municipal employee possesses no "property" interest in his employment.

The conclusion of this Court derives some support from a recent decision of the South Carolina Supreme Court. In Rhodes v. Smith, Op. No. 20919, filed March 21, 1979, 254 S.E. 2d 49 (1979), a case involving the alleged wrongful discharge of a deputy sheriff by a sheriff, the South Carolina Supreme Court held that the County and Municipal Employees Grievance Procedure Act (Sections 8-17-110 et seq. of the 1976 Code) did not limit the power statutorily conferred upon sheriffs by Section 23-13-10 of the 1976 Code to discharge a deputy sheriff at their pleasure.

The Plaintiff next cites several sections of the City of Florence Employee Handbook as being rules or mutually

explicit understandings constituting an implied contract that creates a "property" interest in her employment with the City. The sections of the City of Florence Employee Handbook cited by the Plaintiff are:

> The resolution of Florence City Council adopting the Employee Handbook (p.3 of the Handbook): "[A]ny modern organization with large numbers of employees needs a clearly written set of rules and regulations; and ... a definite need has existed to revise said rules and regulations to maintain tem current and in line with changing times. . . . Be it ... Resolved that a copy [of the revised personnel policy] be given to each present city employee so that he may be aware of the changes incorporated therein and to future employees to inform them of said benefits."
>
> Section entitled "Your Employer's Responsibilities To You" (p.8 of the Handbook): "As an employee, you may expect from the City of Florence: 1. fair treatment at all times . . . 5. Security in employment. . . .
>
> Section entitled "Your Responsibilities To Your Employer" (p.9 of the Handbook): "As your employer, the City of Florence expects you to be: 1. Loyal 2. Fair and courteous in meeting the public and working with your fellow employees 3. Neat in your work and personal appearance 4. Industrious . . . 5. Prompt . . . 6. Economical in the use of supplies and equipment 7. Cooperative with the public and your fellow employees.

Section 4.0 "Permanent and Part-time or Temporary Status" (p.13 of the Handbook): "Section 4.1 Probationary Period. All new employees shall serve a probationary period of six (6) months. . . . If it is determined that the new employee's performance is not meeting required standards, he may be terminated at any time during the probationary period with no redress to the Grievance Committee. (However see Warning on page 27). . . . Section 4.2 Permanent Status. Employees who have satisfactorily completed at least six (6) months of continuous service with the City shall be granted permanent status. Permanent employees are entitled to all benefits and privileges provided in the following chapters of this policy.

Section 5.2 "'Unsatisfactory' Regular Service Evaluation" (p. 14 of the Handbook): "A permanent employee who receives a regular summary year-end evaluation of 'unsatisfactory' must be terminated subject to procedures outlined in the Disciplinary Action Section (Section 10).

Section 7.10 "Returning to Work" (p. 19 of the Handbook): "A disabled employee will be dropped from active status thirty (30) days following the use of all vacation and sick leave but may be reinstated with full seniority to the next job opening of equal status and pay for which he is qualified if he indicates in writing, prior to being dropped from active status, a desire to be reinstated. If an employee indicates in writing

his intention of returning to work, his position may be held open by distributing his work among other employees in the department or by filling the position on a temporary basis if possible. The position may be filled on a permanent basis if it becomes necessary to fill the position in order to insure the continued smooth operation of the department and in order to maintain a high level of quality in the delivery of services to the citizens of Florence. Division Managers shall consult with the Personnel Director prior to taking any action in this regard."

Section 7.11 "Vacation Policy" (p. 19-21 of the Handbook): This section provides certain vacation benefits for "permanent" employees.

Section 9.3 "Lay-Offs" (p. 23-25 of the Handbook):***"If a permanent employee is scheduled to be laid off, he shall be offered a demotion to a lower class if qualified and provided a suitable vacancy exists. . . . Permanent employees shall be notified in writing by the Department Manager of their lay-off at least fourteen (14) days prior to the effective date of lay-off. Employees who are laid off will have recall rights for a specified period of time based upon the length of continuous service to the City, according to the following schedule: (1) Not less than six months nor more than two years of continuous service: recall rights for six months from date of lay-off. (2) More than two years of continuous service: recall rights for one full year from date of lay-off. During the period of recall rights, employees may be recalled to duty in the reverse order in which they were

laid off. No new employees will be hired into any classification while there are employees with recall rights in lay-off status who were laid off from that classification."

Section 10.2 "Warning" (p. 27 of the Handbook): "Counseling will be provided on a timely basis whenever an employee's performance is either commendable or deficient. Written 'summaries' will be made of such counseling incidents and held for reference in preparing the probational or regular service evaluation. When a person working with and counseling an employee indicates that the overall performance of an employee is not meeting performance standards and that his evaluation at the time of his six month probational or regular service evaluation unquestionably will be below 'average' unless noticeable improvement takes place, an employee will be notified of this eventuality at least three months before the evaluation is due, or thereafter if a problem should later develop. The person-to-person notification will be confirmed with a written Warning Notice, the original of which shall be handed to the employee concerned, one copy, signed by the employee, retained by the Division Manager, and one copy, signed by the employee, placed in the employee's personnel folder. The Warning Notice will inform the employee specifically of the following: a. How the employee's performance fails to meet requirements b. What must be done to improve the employee's performance c. That the employee has an opportunity to improve d. That the Supervisor and

> perhaps others in the City are available and willing to give assistance and further training if necessary
> e. That the employee will receive an 'unsatisfactory' summary evaluation if his performance does not improve sufficiently to meet average requirements."

The Plaintiff argues that the above sections of the Handbook reflect "the conceptual grist of our times, the pervasive phraseology of collective bargaining agreements that spell out the job security of millions of our citizens." Plaintiff's "Supplementary Legal Memorandum," August 10, 1979, p. 6. It is the Plaintiff's contention that the presence of "collective bargaining agreement phraseology" in the City of Florence Employee Handbook is clear evidence that economic security or employment rights have risen to the level of a constitutionally protected "property" interest in the City of Florence, so that the City's "employees now have an 'expectancy' of employment -- an expectancy that [they] will not be discharged except for cause." Plaintiff's "Supplementary Legal Memorandum," August

10, 1979, p. 6-7.

Section 4.7 of the Employee Handbook belies any contention that the rules and understandings, promulgated and fostered by the City in the Employee Handbook, justify the Plaintiff's claim of entitlement to continued employment. Section 4.7 provides:

> Job Tenure Not Established. Nothing contained in this title shall be deemed to confer any vested right in employment upon any City employee.

In the face of such explicit language, the Plaintiff had no more than a subjective "expectancy" of continued employment, which is not protected by procedural due process. Perry v. Sindermann, supra, 408 U.S. at 602-03.

It is also significant that the Plaintiff possessed no "property" interest in her employment under the South Carolina common law. As a public officer, the Plaintiff had no enforceable contention of continued employment

under the general rule approved and adopted in State ex rel. Thompson v. Seigler, 230 S.C. 115, 123, 94 S.E. 2d 231 (1956) (quoting 16-A C.J.S. Constitutional Law §600, p. 705); and as an employee, she has not argued or shown that she had an enforceable expectation of continued employment by reason of a contract for permanent employment or for a duration of years which was supported by consideration other than the obligation of service, see, Hudson v. Zenith Engraving Co., Inc., Op. No. 21075, filed November 5, 1979, 259 S.E. 2d 812, 813 (1979) citing Gainey v. Coker's Pedigreed Seed Co., 227 S.C. 200, 87 S.E. 2d 486 (1955); and, finally, as an employee, she has failed to show that she had a contract of employment for a definite duration. See, Orsini v. Trojan Steel Corp., 219 S.C. 272, 276, 64 S.E. 2d 878 (1951); Parker v. Southeastern Haulers, Inc., 210 S.C. 18, 30, 41 S.E. 2d 387 (1947).

It is the conclusion of this Court that the Plaintiff possessed no "property"

interest in her position with the City of Florence which would entitle her to procedural due process.

Since I have concluded the City did not deprive the Plaintiff of an interest in "liberty" and that the Plaintiff did not possess a "property" interest in continued employment, it is unnecessary at this juncture to assess the sufficiency of the procedures employed by the City to accomplish the Plaintiff's dismissal.

II. NON-COMPLIANCE WITH SELF-IMPOSED TERMINATION PROCEDURES. In her final contention, the Plaintiff argues that the Defendants failed to follow self-imposed termination and disciplinary procedures, and that as a result her dismissal was a nullity. Where an agency of the government has chosen to create rules, regulations or procedures governing dismissal of its employees, the agency must

scrupulously abide by them in protecting an employee's removal. This principle was first announced in United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, and subsequently applied by the United States Supreme Court in Service v. Dulles, 354 U.S. 363 and Vitarelli v. Seaton, 359 U.S. 535, 539-40; See also, Yellin v. United States, 374 U.S. 109; Morton v. Ruiz, 415 U.S. 199; Bullock v. Mumford, 166 U.S. App. D.C. 51. The Accardi-Service-Vitarelli doctrine has been interpreted as resting on due process foundations. See, United States v. Caveres, 440 U.S. 741; United States v. Sourapas, 515 F. 2d 295, 298 (9th Cir. 1975); Konn v. Laird, 460 F. 2d 1319 (7th Cir. 1972); Antonuk v. United States, 445 F. 2d 592, 595 (6th Cir. 1971); Hollingsworth v. Balcon, 441 F. 2d 419, 421 (6th Cir. 1971); United States v. Leahey, 434 F. 2d 7, 9 (1st Cir. 1979); United States v. Lloyd, 431 F. 2d 160, 171 (9th Cir. 1970); Government of Canal Zone v. Brooks, 427 F. 2d 346, 347

(5th Cir. 1970); United States v. Heffner, 420 F. 2d 809, 811-812 (4th Cir. 1979); of Shatten v. United States, 419 F. 2d 187, 191 (6th Cir. 1969). See generally Berger, "Do Regulations Really Bind Regulators," 68 NW U. Law Rev. 137 (1967). As a Fourth Circuit Court of Appeals said in United States v. Heffner, supra, 420 F. 2d at 812, "these cases are consistent with the doctrine's purpose to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures."

It makes no difference whether the self-imposed rules and regulations are promulgated in something formally labeled a regulation. The Accardi-Service-Vitarelli doctrice has been applied to a Department of the Interior Order, Vitarelli v. Seaton, supra, the Army's "Weekly Bulletin," Smith v. Reasor, 406 F. 2d 141, 143-44 and n. 2, 146

(2d Cir. 1969); an FCC "rule" established by the FCC's "usual practice," Sangamon Valley Television Corporation v. United States, 106 U.S. App. D.C. 30, (alternate holding); FCC "Standards," American Broadcasting Company, Incorporated v. FCC, 85 U.S. App. D.C. 343, a Department of Defense "Directive," United States ex rel. Brooks v. Grifford, 409 F. 2d 700, 706 (4th Cir. 1969), reh. denied, 412 F. 2d 1137 (4th Cir. 1969); and an instruction to IRS Special Agents in an "IRS News Release," United States v. Heffner, supra.

It is clear, then, that if the City of Florence has failed to comply with termination procedures and rules applicable to the Plaintiff's dismissal, the City's action cannot stand and must be struck down. Morton v. Ruiz, supra, United States v. Heffner, supra; Vandermollen v. Stetson, 571 F. 2d 617 (D.D.C. 1977); see also, Service v. Dulles, supra,

Vitarelli v. Seaton, supra.

The Plaintiff has cited Sections 8-17-110 et seq. of the 1976 South Carolina Code of Laws and the sections of the City of Florence Employee Handbook entitled "Disciplinary Action" (pages 26-28, Section 10) and "Grievance Procedure" (pages 37-40) as being rules and regulations which the City failed to follow in effecting her dismissal. Section 8-17-120 of the South Carolina Code, which enables incorporated municipalities to adopt a plan for the hearing and resolution of employee grievances requires that, if an incorporated municipality elects to establish an employee grievance procedure, it must conform substantially to the guidelines set forth in (Article 3, of Title 8, Chapter 17)." Among these guidelines if the following:

> All members of the grievance committee shall be selected on a broadly repre-

sentative basis from among the career service or appointed personnel of the several county or municipal agencies, with the provision that, whenever a grievance comes before the committee initiated by or involving an employee of an agency of which a committee member is also an employee, such members shall be disqualified from participating in the hearing....

The presiding officer will have control of the proceeding. He shall take whatever action is necessary to insure an equitable, orderly and expeditious hearing.

South Carolina Code of Laws (1976) Section 8-17-130. Other rules and regulations governing the grievance hearing on the Plaintiff's dismissal are contained in the Employee Handbook. In part, these rules provide:

> PURPOSE. The Grievance Procedure of the City of Florence was adopted to assure all City employees that any just grievance may...receive fair and impartial treatment....
>
> THE GRIEVANCE COMMITTEE...All members of a Grievance Committee shall be selected on a broadly representative basis from among the City's personnel with the provisions that, whenever a grievance comes before the committee directly involving a Committee member, such member shall be disqualified from participating in the hearing.
>
> CHAIRPERSON. The responsibilities of the Chairperson are as follows ...make certain that all witnesses, pertinent files, records, papers, and other sources of information are presented as required to ensure fair and equitable hearings....
>
> OTHER GRIEVANCE COMMITTEE MEMBERS. Grievance Committee members are

> responsible as follows: They are responsible for objectively reviewing all of the facts and upholding justice at hearings by voting and making decisions according to their best knowledge, information and belief.
>
> PROCEDURE....The Grievance Committee, after having heard the testimony and after having evaluated all the facts at hand, shall vote to recommend whatever corrective measures are deemed advisable.

While the City of Florence is not required to afford procedural due process absent a constitutionally protected "liberty" interest, the City is bound by its rules. This obligation to comply with established rules applies even if the rules specify procedural safeguards which equal or exceed those mandated by the Constitution. Service v. Dulles, supra; Vitarelli v. Seaton, supra. The quoted provisions of the Employee Handbook clearly reveal that a fair and equitable hearing before an impartial decision maker is contemplated. These promises of fairness and impartiality must be considered as a recognition of minimum standards of procedural decency, which may be

equated with due process. See, Robbins, v. U.S.R.R. Retirement Board, 594 F. 2d 448 (rth Cir. 1979).

The questions involved here, then, are first, what procedural protections are required in the context of this case, and, second, was the process afforded the Plaintiff sufficient to satisfy the required procedural protection.

Due process does not prescribe fixed, inflexible procedures universally applicable to every imaginable situation. Cafeteria and Restaurant Workers Union v. McElroy, supra,367 U.S. at 895; Goss v. Lopez,419 U.S. 565, 578; Fuentes v. Shevin, 407 U.S. 67, 82, 92. The contours of due process are determined by taking into account "the indivudual's stake in the decision at issue as well as the state's interest in a particular procedure for making it." Hortonville Joint School District v. Hortonville Education Association, 426 U.S. 482, 494; Joint Anti-Facist

Refugee Committee v. McGrath, supra; Euentes v. Shevin, supra; Boddie v. Connecticut, 401 U.S. 371, 378; Arnett v. Kennedy, supra, 416 U.S. at 167-68; Robbins v. U.S.R.R. Retirement Board, supra, 594 F. 2d at 452; See generally, Note, "Specifying the Procedures Required by Due Process: Towards Limits on Interest Balancing," 88 Harv. L. Rev. 1510 (1975) and Friendly, "Some King of Hearing," 123 U. Pa. L. Rev. 1267 (1975). In Matthews v. Eldridge, 424 U.S. 319, 335, the Supreme Court stated that identification of the specific dictates of due process generally requires consideration of three distinct factors:

> First, the private interest that will be effected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., Goldberg v. Kelly, supra, 397 U.S., at 263-271.

While the process which is due is determined by balancing the competing interests of the individual and the state, certain elements or ingredients are regarded as the bulwarks of due process, and have, therefore, been considered essentially invariable when the protections of due process are applicable. In Greene v. McElroy, 360 U.S. 474, 496, (1959), the Supreme Court stressed the critical nature of the right to confront and test adverse witnesses:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

See also, Robbins v. U.S.R.R. Retirement Board, supra, 594 F. 2d at 452. In Fuentes v. Shevin, supra, 407 U.S. at 88, the Supreme Court, quoting from Baldwin v. Hale, 68 U.S. (1 Wall) 223, 233, asserted:

> For more than a century the central meaning of procedural due process has been clear; "Parties whose rights are to be effected are entitled to be heard; and in order that they may enjoy that right they must first be notified.:

The Fourth Circuit Court of Appeal has noted that in almost every instance where the termination decision turns on the truth or falsity of disputed facts due process requires an opportunity to confront and cross-examine adverse witnesses. Thomas v. Ward, supra; McNeill v. Butz,480 F. 2d 314, 321 (4th Cir. Ct. 1973); See also, Goldberg v. Kelly, 397 U. S. 254. And a District Court sitting in Maryland stated: "When all other procedural safeguards are weeded out because of pressing government interests, these two (notice and an opportunity to be heard) remain." Patterson v. Ramsey, 413 F. Supp. 523, 538 (D. Maryland 1976). Finally, courts have identified the elements which constitute minimum procedural due process. These elements include: (1) Notice and specification of the charges, (2) opportunity to be heard, (3) opportunity to confront

accusers, and (4) an impartial tribunal. Morrisey v. Brewer, 408 U.S. 471, 488-89; Satterfield v. Edenton-Chowan Board of Education, 530 F. 2d 567 (4th Cir. 1975); Vance v. Chester County Board of School Trustees, 504 F. 2d 820 (4th Cir. 1974); Grimes v. Nottoway County School Board, 462 F. 2d 650, 653 (4th Cir. 1972); Dixon v. Alabama State Board of Education,294 F. 2d 150 (5th Cir. 1961); Ferguson v. Thomas, 430 F. 2d 852 (5th Cir. 1970).

The few contexts in which the minimum elements of due process have not been applied have involved critical governmental interests such as the maintenance of order in prisons, Wolff v. McDonnell, 418 U.S. 539, the protection of society from anti-social acts which might be committed by parolees, Morrisey v. Brewer, supra, 408 U.S. at 483 (1972), and national security, Greene v. McElroy, supra. And even in cases

where the government's interest is one of extreme importance, the court has discounted its "weight" when a hearing would not seriously interfere with the state's ability to achieve its objective. See, Morrisey v. Brewer, supra, 408 U.S. at 483; Goss v. Lopez, supra, 419 U. S. 565. Here, there is no critical government interest involved. Nor is the City's interest in performing its responsibilities effectively and efficiently threatened by affording Plaintiff minimum due process at the post termination grievance hearing. At the time of the hearing, the Plaintiff was not employed by the City and was, therefore, no longer an obstacle if ever she was, to the implementation of the City Manager's plans or the efficient operation of the City Manager's office. At best, the City's interest is in minimizing the administrative burden imposed upon it by affording the Plaintiff minimum due process. But this is the very burden the City gratuitously accepted

when it promised its employees "fair and impartial treatment" of grievance and "fair and equitable hearings." The City of Florence Handbook, Grievance Procedure, pp. 37-38. What the Fourth Circuit Court of Appeals said in a case involving the dismissal of two government employees is apposite here:

> (W)e conclude that the relative natures of the government function and the private interests do not permit the government to discharge these employees without providing notice and a hearing at which the employees can confront and cross-examine the government's informers. In both cases, the propriety of dismissal hinged strictly on factual determination, and the evidence consisted primarily of individual testimony. Thus, these dismissals arise in a context where confrontation and cross-examination are paradigmatically useful in discovering the truth.... We do not dispute that the government has a substantial interest in the efficient and orderly discharge of unsatisfactory employees. But this interest does not outweigh the employee's interest in having an effective opportunity to challenge damning evidence.... Despite its concern for the efficient discharge of derelict employees,

> the Department of Agriculture has created considerable procedural burdens for itself, even in cases such as these which involve non-civil service employees....The government expends considerable effort to provide a semblence of due process: notice, hearing, appeal. It is evident that this system already occasions considerable governmental inconvenience. The incremental physical burden of presenting the accusing witnesses for cross-examination upon the employee's timely and good faith request would neither be crippling nor add a significant additional burden....

McNeill v. Butz, supra, 480 F. 2d at 322-23. Similarly, in this case, there is no indication that the City's interest outweighed the Plaintiff's interest in being notified of the case against her and in having an effective opportunity to be heard and to challenge the evidence against her. The City's interest does not excuse it, in meeting its obligation to afford "fair and equitable hearings," from affording the Plaintiff the traditional elements of a due process hearing.

Having concluded that the Plaintiff is entitled to at least minimal due process, I must, now, determine if the procedures afforded

her by the City provided "adequate notice, a specification of the charges against her, an opportunity to confront the witnesses against her and an opportunity to be heard in her own defense." Vance v. Chester County Board of Trustees, supra, 504 F. 2d at 824; Grimes v. Nottoway County School Board, supra, 462 F. 2d at 653.

As a general rule, for notice to be constitutionally adequate, it must apprise the person, who is to be affected by the government action, of the charges against him in such specifics and at such time as to permit meaningful preparation of a response. In Re Ruffalo, 390 U.S. 544, 550; In Re Gault, 387 U. S. 1. Although each case must be decided on its peculiar facts, Vance v. Chester County Board of Trustees, supra, 504 F. 2d at 824; Grimes v. Nottoway County School Board, supra,462 F. 2d at 653; Ferguson v. Thomas, supra, 430 F. 2d at 856, certain general guidelines exist. One such

guideline, applicable here, is that excessively general charges are insufficient to satisfy due process. In In Re Gault, supra, for example, the Supreme Court found a general charge of "delinquency" to be constitutionally inadequate.

Here, the only notice of the charges against the Plaintiff was contained in the letter of termination from the City Manager to the Plaintiff. The grounds for her dismissal as set forth in the termination letter are as follows: "(1) Not making an effort to use proper discretion in the City Manager's office. (2) Not supporting and cooperating with the City Manager. (3) Insubordination. (4) Misrepresenting facts concerning the City Manager's decisions. (5) Defying warnings from the City Manager." To a large extent, these charges were founded upon information supplied to the City Manager by other City employees and a newspaper reporter. The identity of these individuals and the substance of their allegations relied upon by the City Manager

in discharing the Plaintiff were not revealed to the Plaintiff until the trial before this Court, so that the Plaintiff was, in effect, precluded from marshalling evidence in preparing her case so as to benefit from the grievance hearing. Therefore, even under the malleable due process standard, the notice of the grounds for the Plaintiff's termination was inadequate.

The basic rule regarding opportunity to be heard is that it be presented at "a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552; Grannis v. Ordean, 234 U.S. 385. It is true that in this case the Plaintiff was afforded an opportunity to appear at the grievance hearing. The question, however, is whether, during her appearance before the Grievance Committee, she was given an opportunity to present a case in her defense. The record revealed that the Plaintiff and her attorney were the first

to be called before the Grievance Committee, but it is silent as to how this phase of the hearing was conducted. One thing is clear however. Any case that the Plaintiff was able to present was made with no more information as to the case against her than was provided by the generally worded grounds given for her dismissal in the July 28, 1978 letter of termination. The Plaintiff did not even have the benefit of such notice as she would have received from hearing the presentation of the City Manager's case against her, since she and her attorney were excluded from the hearing room during that time. Such insufficient notice of the specific charges against the Plaintiff deprived her of an adequate opportunity to be heard. What the Pennsylvania Court said in Mellon v. Travelers Insurance Company is apposite here:

> Notice and the opportunity to be heard are essential elements of a fair hearing....Litigants require not simply notice that a hearing is to occur, but also notice of the issues to be litigated. The principal function of pleadings, even in their shortened,

> modern form, is to focus the litigants' attention on issues so that they may marshal their evidence and prepare their arguments. Thus notice is integrally linked to the right to be heard, for without notice, litigants are ill-equipped to assert their rights and defend against claims. Here, appellants were denied their right to notice, and so their right to be heard....Consequently, they never marshalled such evidence nor prepared such arguments as they might have had against the claims.

The Fourth Circuit Court of Appeals has given specific guidance on the extent of the right of confrontation in a case involving termination of public employment. McNeill v. Butz, supra; Satterfield v. Edenton-Chowan Board of Education, supra. In McNeill, the Plaintiff, Canady, was deprived of her job as a result of evidence to which she was unable to respond. The evidence against her consisted solely of the testimony of nameless informants, who she was not allowed to cross-examine, and investigative and audit reports of which she was furnished only selected excerpts, which were supplied some time

after the Plaintiff's hearing. Even then the excerpts contained "only second-hand recapitulations of incriminating evidence, but not the identity of any government witness." McNeill v. Butz, supra, 480 F. 2d at 318, 325-16. There, the Court of Appeals held that the Plaintiff, Canady, was deprived of due process. Satterfield represents the other end of the continuum. In that case, only a small part of the evidence against the Plaintiff emanated from unconfrontable sources. This evidence consisted of the testimony of two school officials which related to complaints received by them from individuals unavailable for cross-examination. "The real evidence" against the Plaintiff in Satterfield "was based, not on hearsay or complaints made by others, but on the actual observation and the personal knowledge of the witnesses," who were available for cross-examination by the Plaintiff. Satterfield v. Edenton-Chowan Board of Education, supra, 530 F. 2d at 571, 573. The Satterfield Court

of Appeals held that the Plaintiff was not deprived of due process. Together, McNeill and Satterfield teach that "(t)he right to confrontation is not denied when very minor parts of the evidence against an individual come from anonymous sources while the major reasons for the dismissal consist of direct testimony and documentary evidence." Patterson v. Ramsey, supra, 413 F. Supp. at 541. In this case, the majority, if not all, of the evidence against the Plaintiff consisted of testimony from witnesses who were unknown to the Plaintiff and who testified that the decision to terminate the Plaintiff was based, in part, upon information received from several City employees and a newspaper reporter.) The record reveals that after appearing before the Grievance Committee the Plaintiff and her attorney were instructed by the Committee to leave the hearing room. It was not until after the City Manager had presented the case against the Plaintiff that she

and her attorney were permitted to return to the hearing room, and then her appearance was only to respond to questions propounded by the Grievance Committee. The Plaintiff was afforded no opportunity to confront her accusers. This procedure constitutes the clearest and most repugnant violation of the rudiments of a fair hearing and due process. The vice of such a procedure as is employed by the City of Florence was implied in the words of the United States Supreme Court in Greene v. McElroy, supra, 360 U.S. at 496:

> (W)here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, indictiveness, intolerance, prejudice, or jealousy.

It is the conclusion of this Court that the City's procedures which failed to provide the

Plaintiff adequate notice and effective opportunity to be heard and an opportunity to confront her accusers did not afford "fair and equitable treatment" of her grievance or "fair and impartial hearings" or "(f)air treatment at all times" as promised in the City of Florence Employee Handbook.

Besides neglecting to follow its own rules regarding the grievance procedure, the City of Florence failed to comply with its regulations relating to disciplinary action as set forth in Section 10.2 of the Employee Handbook. Section 10.2 has been quoted at length in an earlier section of this Order.

The Plaintiff asserts that the City failed to comply with Section 10.2 of the Employee Handbook when the City Manager did not compose a written summary of counseling incidents which occurred on May 29th, May 30th and May 31st of 1978. Having failed to make a written

summary of the counseling incidents, the Plaintiff argues that the City Manager could not have complied with the further requirement that the written summaries be "held for reference in preparing the probational or regular service evaluation." Section 10.2, City of Florence Employee Handbook, p. 27. Finally, the Plaintiff contends that she was not notified that her regular service evaluation would be below average unless she showed improvement and, consequently, she did not receive a written Warning Notice confirming oral notification.

The Defendants argue, first, that the discussion between the City Manager and the Plaintiff on May 31, 1978, was the result of a misunderstanding, which was clarified by their conversation so that there was no need to prepare a written summary. As a second argument, the Defendants contend that Section 10.2 contemplates written summaries of counseling incidents and oral and written notice of below average performance only for

the purposes of preparing an employee's six month probational or regular service evaluation. In other words, the Defendants contend that in the circumstance where an immediate termination is necessary, no written summaries and notice are required.

Even if the Defendants' first agrument is correct, it ignored the fact that "counseling incidents" occurred on ocassions other than May 31, 1978. On May 29, 1978, there was a discussion between the Plaintiff and the City Manager concerning the Plaintiff's ability to continue to work with and support the City Manager in light of her feelings about the new pay plan. The serious nature of this conversation is indicated by the fact that the Plaintiff was to resign on the following day if she decided she was unable to work with the City Manager. On July 18, 1978, a "counseling incident" was

initiated by the City Manager to discuss "some concerns he had." This conversation, which preceeded the Plaintiff's termination by approximately a week, focused on the City Manager's concern that the confidential relation between he and the Plaintiff had eroded. Neither of these counseling episodes was reported in a written summary. As for the Defendants' argument that no written summary of the May 31, 1978 counseling incident was required by the Employee Handbook, it overlooks the clear language of Section 10.2. Section 10.2 states that written summaries "will" be made of counseling incidents and held for reference. Nothing in the language of Section 10.2 suggests that an employee's supervisor has discretion to decide when to prepare a written summary.

The Defendants' second argument is as unavailing as the first. Even assuming, as the Defendants do, that Section 10.2 is not applicable when termination is imminent there

at least one occasion which fell within the scope of Section 10.2 as interpreted by the Defendants. During the discussion between the City Manager and Plaintiff on July 18, 1978, the City Manager informed the Plaintiff that he would no longer tolerate her undermining his office and her misrepresentations of facts and that if she persisted, she would be terminated. Although the City Manager did not directly inform the Plaintiff, the message was clear that the Plaintiff's overall performance was not meeting performance standards and that her next regular performance evaluation by the City Manager would be below average unless she changed. Therefore, under Section 10.2, the Plaintiff was entitled to a written Warning Notice confirming the oral notice of July 18, 1978. No such written notice was given. The Defendants' failure to supply the Plaintiff

with a written Warning Notice cannot be excused on the basis that it was necessary to immediately terminate the Plaintiff. The July 18, 1978 incident preceded the Plaintiff's dismissal by approximately six to seven days, and the Defendant City Manager testified himself that he did not decide to terminate the Plaintiff until July 25, 1978, after a conversation with Jeannie Griffin, a newspaper reporter. Thus, on July 18, 1978, the Plaintiff's termination was not imminent. In fact, on July 18, 1978, the City Manager specifically told the Plaintiff that she was not terminated at that time. The Defendants might argue that since the Plaintiff had oral notice and clearly understood her position, non-compliance with Section 10.2 was harmless. Such an argument would be wide of the mark, since the Accardi-Service-Vitarelli doctrine demands "scrupulous" observance of even gratuitously promulgated rules and regulations. See e.g., Vitarelli v. Seaton, supra,

359 U.S. at 540.

It is the conclusion of this Court that the City of Florence has failed to comply with its own regulations and procedures as set forth in Section 10.2 and 10.3 of the City of Florence Employee Handbook. Therefore, the Plaintiff's dismissal was "illegal and of no effect." Vitarelli v. Seaton, supra, 359 U.S. at 544.

DAMAGES

In addition to a declaration of this Court that her termination was wrongful, the Plaintiff seeks damages for salary withheld from her druing the period of her illegal removal. While it is not the primary function of courts in a declaratory judgment action to award damages, it is generally held that a money judgment or judgment for damages may be obtained as consequential relief. Anno.: ALR 501, 516-519; 22 Am.Jur. 2d

Declaratory Judgments Sec. 100, p. 967, 968; 26 C.J.S. Declaratory Judgments §§ 162, p. 379; Borchard, Declaratory Judgments §§ 360, p. 304 (1941) and the cases cited therein.

Ordinarily in the case of an improperly discharged public employee, courts order the wronged employee reinstated to his former position or one of comparable pay and status with back pay from the date of the illegal removal to the date of reinstatement. See e.g., Vitarelli v. Seaton, supra, Athas v. United States, 597 F. 2d 722, 726-727 (Ct. Cl. 1979); Jannetta v. Cole, 493 F. 2d 1334, 1338 (4th Cir. 1974); McNeill v. Butz, supra,480 F. 2d at 326; Smith v. Hampton Training School for Nurses, 360 F. 2d 577, 581 (4th Cir. 1966); Greminger v. Seaborne,584 F. 2d 275, 279 (8th Cir. 1978); McKamey v. United States, Ct. Cl. 28, 458 F. 2d 47 (1972); Daub v. United States, 154 Ct. Cl. 434, 292

F. 2d 895 (1961); Gerrin v. Hickey, supra; West v. Board of County Commissioners, Monroe County, 373 So. 2d 83, 86-88 (Fla. App. 1979); Massman v. Secretary of Housing and Urban Development, 332 F. Supp. 894, 900 (D.D.C. 1971); State ex rel. Clark v. Dadisman,154 W. Va. 340, 175 S.E. 2d 422, 426-27 (1970); Bava v. Civil Service Commission, 154 W. Va. 701, 178 S.E. 2d 839 (1971); State ex rel. Streitfeld v. White, 33 Ohio App. 2d 47, 291 N.E. 2d 766, 769 (1972); Schall v. State ex rel. Department of Human Resources, 587 P. 2d 1311, 1312 (Nev. 1978); Luchansky v. Barger, 14 Pa. Cmwlth. 26, 321 A. 2d 376, 386 (1974); 67 C.J.S. Officers and Public Employees §§ 221, p. 710, 711. Here, the Plaintiff has waived her right to reinstatement although she originally sought such a remedy in her "Amended Complaint," so that her lost salary

cannot be calculated from the date of her illegal dismissal to the date of her reinstatement. (See Plaintiff's "Legal Memorandum," December 4, 1979, p. 26). An award of back pay is designed to compensate the wronged employee for the wages or salary he lost during the period he was illegally deprived of his employment. In this case, the Plaintiff's employment was wrongfully withheld from July 28, 1978, the date of the Plaintiff's illegal dismissal until December 4, 1979, when the Plaintiff determined she no longer wanted to be restored to her employment with the City. At that point, when the Plaintiff waived reinstatement, the City of Florence no longer wrongfully excluded the Plaintiff from her employment and its accompanying salary.

At trial, the Plaintiff testified that at the time of her removal on July 28, 1978 she was employed at a salary of Eleven Thousand Eighty-six ($11,086.00) Dollars per year. Therefore, the Plaintiff's lost salary for the

period from July 28, 1978 to December 4, 1979 was Fifteen Thousand Eight and 88/100 ($15,008.88) Dollars. (The $15,008.88 figure is the sum of Ms. Dew's salary for one year, July 28, 1978 to July 29, 1979 and $3,922.88, her salary per work day ($42.64) multiplied by the work days (92) from July 28, 1979 to December 4, 1979). This figure, however, must be reduced by the One Thousand ($1,000.00) Dollars that the Plaintiff testified she earned in other employment after her dismissal by the City. See, McNeill v. Butz, supra, 480 F. 2d at 326; Smith v. Hampton Training School for Nurses, supra, 360 F. 2d at 581; Wall v. Stanley County Board of Education, supra, 378 F. 2d at 278; Carroll v. Civil Service Commission of Kern County,107 Cal. Rptr. 557, 31 Cal. App. 3d 561 (1973); Cole v. City of Houston, 442 S.W. 2d 445 (Tex. Civ. App.

1969); Prowler v. New York, 216 App. Div. 824, 216 N.Y.S. 901 (1926), aff'd 243 N.Y. 607, 154 N.E. 624 (1926); Greminger v. Seaborne, supra, Schall v. State ex rel. Department of Human Resources, supra; 56 Am. Jur. 2d Municipal Corporations §§ 332, p. 363; 56 C.J.S. Master and Servant §§ 59 at p. 472. Thus, the Plaintiff is entitled to an award of Fourteen Thousand Eight and 88/100 ($14,008.88) Dollars in damages for lost salary.

By virtue of the foregoing findings and conclusions, it is ordered, declared, adjudged and decreed that the actions taken by the City of Florence to remove the Plaintiff, Miriam L. Dew, from her position as Administrative Assistant to the City Manager were illegal and of no effect as a result of the City's failure to comply with its own rules and regulations governing the Plaintiff's dismissal as those rules and regulations are

set forth in Sections 10.2 and 10.3 of the City of Florence Employee Handbook; and therefore, the Plaintiff is entitled to Fourteen Thousand Eight and 88/100 ($14,008.88) Dollars in settlement of her claim for lost salary for the period the unlawful removal action was in effect, and to costs.

AND IT IS SO ORDERED.

/s/George F. Coleman

GEORGE F. COLEMAN,
PRESIDING JUDGE

Winnsboro, South Carolina
May 23, 1980.

APPENDIX C

STATE STATUTES

CHAPTER 17

State or Local Employees Grievance Procedure

Article 1. State Employee Grievance Procedure.

Article 3. County and Municipal Employees Grievance Procedure.

ARTICLE I

STATE EMPLOYEE GRIEVANCE PROCEDURE

Sec.
8-17-10. Legislative findings, declaration of purpose and short title.
8-17-20. Agency and departmental employee grievance procedures; proper subjects for consideration under such procedures.
8-17-30. (Omitted)
8-17-40. (Omitted)

Section 8-17-10. Legislative findings, Declaration of purpose and short title. The General Assembly finds that harmonious relations between public employers and public employees are a necessary and most important factor in the effective and efficient operation of government and that a proper forum

for the understanding and resolution of employee grievances will contribute to the establishment and maintenance of harmony, good faith and the quality of public service. It is for the purpose that this article, which may be cited as the "State Employee Grievance Procedure Act of 1974," is enacted.

HISTORY: 1962 Code Sec. 1-49.15; 1971 (57) 399; 1974(58) 2203.

Section 8-17-20. Agency and departmental employee grievance procedures; proper subjects for consideration under such procedures. Each agency and department of State government shall establish an employee grievance procedure within such agency or department, which shall be reduced to writing and be approved by the State Personnel Director. A copy of the approved grievance procedure plan shall be furnished and explained to each employee of the agency or department concerned. The plan shall provide that the department or agency shall act on a grievance within forty-five days. Failure to act positively within

such period will be considered an adverse decision for the employee from which he may appeal. No employee shall be disciplined or otherwise prejudiced in his employment for exercising his rights under the plan, and department and agency heads shall encourage the use of the plan in the resolution of grievances arising in the course of public employment. As used in this section, grievances may include but are not necessarily limited to classification, dismissal, suspensions, involuntary transfers, promotions and demotions. Compensation shall not be deemed a proper subject for consideration under the grievance procedure except as it applies to alleged inequities within a particular agency or department. Classification shall be deemed a proper

subject for consideration only as it relates to the application of the classification system to a particular individual and shall not include grievances related to the structure of the system. Sections 8-17-30 and 8-17-40 omitted.

HISTORY: 1962 Code Sec. 1-49-16; 1971 (57) 399; 1974 (58) 2203.

ARTICLE 3, COUNTY AND MUNICIPAL EMPLOYEES GRIEVANCE PROCEDURE:

Sec.
8-17-110. Legislative findings, declaration of purpose and short title.
8-17-120. Adoption of plan for resolution of employee grievances; proper subjects for consideration under such plans.
8-17-130. Establishment, membership, and powers of grievance committees.
8-17-140. Findings and decisions of committee; review by local governing body.
8-17-150. Request for hearing before committee.
8-17-160. Powers of city managers.

Sec. 8-17-110. Legislative findings, declaration of purpose and short title.

The General Assembly finds that a uniform procedure to resolve grievances of county and municipal employees arising from their public employment will contribute to more harmonious

relations between public employers and public employees and result in an improvement in public service. The purpose of this article, which may be cited as the "County and Municipal Employees Grievance Procedure Act," is to implement this principle.

HISTORY: 1962 Code Sec. 1-66.11; 1971 (57) 479.

Cross references-
As to counties, generally, see Title 4.
As to municipal corporations, generally, see Title 5.

Research and Practice References-
Public Employee Strikes. 21 SC L Rev 771.

Sec. 8-17-120. Adoption of plan for resolution of employee grievances; proper subjects for consideration under such plans.

The governing body of any county or any incorporated municipality in this State may by ordinance or resolution adopt a plan for the hearing and resolution of employee grievances which, if adopted,

shall conform substantially to the guidelines set forth in this article. As used in this article, grievances may include, but shall not necessarily be limited to, dismissal, suspensions, involuntary transfers, promotions and demotions. Compensation shall not be deemed a proper subject for consideration under the grievance procedure except as it may apply to alleged inequities within an agency or department of the particular county or municipal jurisdiction.

HISTORY: 1962 Code Sec. 1-66.12; 1971 (57) 479.

Sec. 8-17-130. Establishment, membership, and powers of grievance committees.

The governing body of each county and incorporated municipality which elects to establish an employee grievance procedure pursuant to this article shall appoint a committee composed of not less than three nor more than nine members to serve for terms of three years, except that the members

appointed initially shall be appointed so that terms will be staggered and one third of the terms shall expire each year. Any interim appointment to fill a vacancy for any cause prior to the completion of his term shall be for the unexpired term. Any member may be reappointed for succeeding terms at the discretion of the appointing authority. All members of the grievance committee shall be selected on a broadly representative basis from among the career service or appointed personnel of the several county or municipal agencies, with the provision that, whenever a grievance comes before the committee initiated by or involving an employee of an agency of which a committee member also is an employee, such member shall be disqualified from participating in the hearing.

The committee shall select its own chairman from among its members. The

chairman shall serve as the presiding officer at all hearings which he attends but may designate some other member to serve as presiding officer in his absence.

A quorum shall consist of at least two thirds of the committee members, and no hearings may be held without a quorum.

The presiding officer will have control of the proceedings. He shall take whatever action is necessary to insure an equitable, orderly and expeditious hearing. Parties shall abide by his decisions, except when a committee member objects to a decision to accept evidence, in which case the majority vote of the committee will govern.

The committee shall have the authority to call for files, records and papers pertinent to any investigation; to determine the order of the testimony and the appearance of witnesses; to call additional witnesses; and to secure the services of a recording secretary in its discretion.

HISTORY: 1962 Code Sec. 1-66.13;1971(57)479.

Sec. 8-17-140. Findings and decisions of committee; review by local governing body.

The committee shall, within twenty days after hearing an appeal, make its findings and decision and report such findings and decision to the governing body. If the governing body approves, the decision of the grievance committee shall be final, and copies of the decision shall be transmitted by the committee to the employee, to the chief administrative officer and to the particular department or agency involved. If, however, the governing body rejects the decision of the committee, it shall make its own decision without further hearing, and that decision shall be final, with copies transmitted to the employee and the employing agency.

HISTORY: 1962 Code Sec.1-66.14; 1971 (57) 479.

Sec.8-17-150. Omitted.
Sec. 8-17-160.Omitted.

APPENDIX D

Verbatim excerpts from Respondent's official forty-three (43) page employee handbook. (Petitioner has underlined salient portions of extracts from the Employee Handbook for emphasis.)

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE) RESOLUTION

WHEREAS, any modern organization with large numbers of employees needs a clearly written set of rules and regulations; and

WHEREAS, a definite need has existed to revise said rules and regulations to maintain them current and in line with changing times; and

WHEREAS, said revision has now been completed by the City Manager and the necessary changes have been made to the extent that employees presently with the city and those who may be employed in the future will benefit by these rules and regulations; that in opinion of this Council said revision will also assist the city government in the employment of new personnel when required in the

future. Now, Therefore,

BE IT RESOLVED, by the City Council of the City of Florence that the Personnel Rules and Regulations of the City of Florence and as presented to the City Council with the agenda for the March 27, 1978 meeting, be and they are hereby revised. Be it

FURTHER RESOLVED that a copy be given to each present city employee so that he may be aware of the changes incorporated therein and to future employees to inform them of said benefits.

Adopted this 27th day of March, 1978.

YOUR EMPLOYER'S RESPONSIBILITIES TO YOU

As an employee, you may expect from the City of Florence:

1. Fair treatment at all times
2. Adequate pay, comparable to similar positions in business, industry and nearby governments
3. Clean, healthy, comfortable working conditions, whenever possible

4. Modern equipment and materials
5. Security in employment
6. Informed supervision
7. Opportunity for advancement

YOUR RESPONSIBILITIES TO YOUR EMPLOYER

As your employer, the City of Florence expects you to be:

1. Loyal
2. Fair and courteous in meeting the public and working with your fellow employees
3. Neat in your work and personal appearance
4. Industrious: a day's work for a day's pay
5. Prompt. When you are late your work falls behind and you may delay someone else.
6. Economical in the use of supplies and equipment
7. Cooperative with the public and your fellow employees

PERMANENT AND PARTTIME OR TEMPORARY STATUS

4.1 Probationary Period

All new employees shall serve a probationary period of six (6) months.

During this period, a supervisor will evaluate an employee's performance. This also gives an employee an opportunity to discuss matters regarding his present employment and future retention. If it is determined that the new employee's performance is not meeting required standards, he may be terminated at any time during the probationary period with no redress to the Grievance Committee. (However see Warning on page 27). If requested by the Division Manager and approved by the City Manager, the probationary period may be extended for up to ninety days.

4.2 Permanent Status

Employees who have satisfactorily completed at least six (6) months of continuous service with the City shall be granted permanent status. Permanent employees are entitled to all benefits and privileges provided in the

following chapters of this policy.

4.3 Parttime Status

Employees who work over 20 but under 30 hours per week and work year around (12 months) shall be considered part-time employees. Such employees will be eligible for Workmen's Compensation, the City's insurance program and may accrue vacation and sick leave according to the policy established.

4.4 Temporary Appointments

Employees who do not work year around and who work for a period of less than 20 hours per week, shall be considered temporary employees.

Temporary employees shall be covered under Workmen's Compensation, but not the City's insurance program and may not accrue any vacation or sick leave. (This policy shall become effective upon its adoption and shall not be retroactive.) Temporary employees are not eligible to receive fringe benefits and shall only

be paid for actual hours worked. A temporary appointment may be for a period not to exceed three (3) months, but may be renewed on a similar limited basis if the employee's services are still required. Temporary appointments and extensions of temporary appointments must be cleared through the Personnel Office. In the event the temporary position becomes permanent, the period of temporary employment shall count toward the employee's duration of employment and fulfillment of the required six month probationary period. However, a temporary employee appointed to a permanent position, requiring duties not previously performed in a temporary position, shall be required to meet the six month probationary period following the date of appointment to the permanent position.

4.5 CETA Employees

All policies, regulations and benefits which apply to regular City employees apply equally to employees who are hired under the Comprehensive Employment and Training Act (CETA), with the exception of participation in the S. C. State Retirement System. CETA employees are paid by the federal government and their term of employment, while in good standing, is determined by the duration of the contract under which they are employed.

4.6 Grant Funded Employees

Employees whose salaries and benefits are funded by a federal grant -- such as the Community Development Block Grant or Law Enforcement Grant -- are considered regular City employees, however, their employment is contingent upon continued grant funding. The policies and procedures, regulations and benefits which apply to other City employees apply equally to these

employees.

4.7 Job Tenure Not Established

Nothing contained in this title shall be deemed to confer any vested right in employment upon any City employee.

EMPLOYEE EVALUATION

5.1 Regular Performance Evaluation

Evaluations are conducted for new employees as well as for those employees who have transferred into new positions at the end of six months and annually thereafter. After an employee earns permanent status he is evaluated once a year on the anniversary date of his employment. The evaluation will be discussed with the employee by the Supervisor, Department or Division Manager who conducts the evaluation.

5.2 "Unsatisfactory" Regular Service Evaluation

A permanent employee who receives a

regular summary year-end evaluation of "unsatisfactory" must be terminated subject to procedures outlined in the Disciplinary Action Section.

6.4 Salaries

An employee is usually hired for a position at Step A of the Pay Plan whether he is a new employee, or one who has been transferred or promoted within the City. Following the satisfactory completion of a six months probationary period (or an extended probation), an employee, with the approval of the Division Manager, will be promoted to Step B of the Pay Plan. An employee who is hired at any step other than Step A shall not be advanced at the end of his probationary period. Cost of living increases, however, may be granted to all employees at the beginning of the new fiscal year or at such other time as may be approved by the City Council.

7.8 Sick Leave

All permanent, full-time employees shall earn sick leave (commencing on the date of employment) at the rate of one day for each calendar month of service. Permanent parttime employees will accrue sick leave on a pro-rated basis as authorized by the City Manager. Temporary employees shall not accrue sick leave effective upon the date of adoption of this policy, however, this shall not be retroactive. Sick leave is a privilege which shall be used only for sickness, injury, medical or dental appointments, or if an employee has been exposed to a quarantinable disease. Abuse of this leave shall result in a letter of reprimand to be signed by the employee and filed with the personnel office. Sick leave may be accrued without limitation. No payment for unused sick leave will be made. . . .

7.10 Returning to Work

A disabled employee will be dropped from active status 30 days following the use of all vacation and sick leave but may be reinstated with full seniority to the next job opening of equal status and pay for which he is qualified if he indicates in writing, prior to being dropped from active status, a desire to be reinstated.

If an employee indicates in writing his intention of returning to work, his position may be held open by distributing his work among other employees in the department or by filling the position on a temporary basis if possible. The position may be filled on a permanent basis if it becomes necessary to fill the position in order to insure the continued smooth operation of the department and in order to maintain a high level of quality in the delivery of services to

the citizens of Florence. Division Managers shall consult with the Personnel Director prior to taking any action in this regard.

7.11 Vacation Policy

It is the policy of the City of Florence to provide paid vacation time for all permanent employees thereby affording them an opportunity for healthful rest and relaxation. All full time employees are encouraged to take the equivalent of at least one work week of paid vacation each calendar year. All permanent employees (who have completed at least six months of satisfactory service) shall earn vacation time according to the following schedule:

a. Full time, permanent employees shall receive one day per month, or twelve days per year up to and including five years,

commencing upon the completion of the probationary period. Note: This is not to be misconstrued to mean that any vacation is accumulated during the probationary period.

b. Full time, permanent employees, beginning their sixth year and continuing through the fifteenth year, shall annually receive three work weeks (15 days) vacation credit.

c. Fulltime, permanent employees shall receive four work weeks or (20) days vacation time beginning the sixteenth year of continuous employment.

d. A maximum accumulation of vacation time shall be limited to that time which an employee may accrue during two consecutive years. Any accumulation above that number shall be lost.

e. Permanent part-time employees (who

work over 20 but under 30 hours per week, year round) following a satisfactory 6-9 month probationary period, shall receive one day for every 160 hours worked, or, in other words, it shall be pro rated as outlined for full-time employees.

f. Temporary employees shall not accumulate any vacation or sick leave time. This policy shall become effective upon adoption of this Employee Handbook and shall not be retroactive.
Note: No vacation time may be accrued during the six-month probationary period for new employees. . . .

8.4 Education Benefits

If position-related training is other than on-the-job training and involves an educational institution, the City will pay tuition costs upon

approval by the Division Manager. (Cost of books shall be at the expense of the employee.) Tuition costs will be paid only after the course is satisfactorily completed with a minimum of a "C" average and receipt of a "paid" tuition statement from the institution involved. (Note: Only those employees who initiate such programs while working for the City shall qualify.)

If the City pays full tuition costs in a degree program, an employee will be required to sign a statement guaranteeing that he will work for the City at least one year after completion of his training for every year the City has paid his tuition. If he does not work the agreed upon time, he must pay back to the City all money paid for tuition.

9.3 Lay-Offs

a. If it becomes necessary to reduce the work force in a department or

division due to a lack of funds or for other reasons, employees shall be laid off on the basis of the following factors, to be weighed equally: (1) length of service in a class, (2) length of service with the City, and (3) the average performance rating for the last three years of service, or for the entire period if less than three years.

b. When a Department Manager believes that a certain individual is essential to the efficient operation of the department because of special skills or abilities, and he wishes to retain this individual in preference to a person with a higher rating as provided above, he must submit a written request to the Division Manager for permission to do so. This request must set forth in detail the

specific skills and abilities possessed by the individual and the reasons why the individual is essential to the effective operation of the department. If the Division Manager approves the request, the individual may be retained.

c. If a permanent employee is scheduled to be laid off, he shall be offered a demotion to a lower class if qualified and provided a suitable vacancy exists.

d. Prior to a reduction in force, the names and class titles of any and all permanent employees scheduled for layoff shall be submitted to the City Manager for approval, and not until the City Manager has approved and confirmed the names submitted for lay-off shall any lay-off be effected.

e. Permanent employees shall be notified in writing by the Department

Manager of their lay-off at least fourteen (14) days prior to the effective date of lay-off.

f. Employees who are laid off will have recall rights for a specified period of time based upon the length of continuous service to the City, according to the following schedule:

(1) Not less than six months nor more than two years of continuous service: recall rights for six months from date of lay-off.

(2) More than two years of continuous service: recall rights for one full year from date of lay-off.

During the period of recall rights, employees may be recalled to duty in the reverse order in which they were laid off. No new employees

may be hired into any classification while there are employees with recall rights in lay-off status who were laid off from that classification.

9.4 Dismissal

Any employee may be dismissed or suspended by a Division or Department Manager or by the City Manager. A written statement of the reason(s) for the dismissal shall be submitted to the Personnel Director. The employee shall be entitled to a copy of the written statement of reasons for the dismissal or suspension and shall be allowed to reply to the same in writing within five (5) days of receipt of said statement. In the event the employee is reinstated after having gone before the Grievance Committee, he shall be entitled to all back pay and all employee benefits, including accumulated sick leave.

9.5 Suspension

An employee may be suspended without pay for disciplinary purposes.

During any investigation, hearing, or trial on any criminal charge, or during the course of any civil action involving an employee, or when suspension would be in the best interest of the employee of the City, the Division Manager may suspend an employee without pay as a non-disciplinary measure. If a non-disciplinary suspension is ended by reinstatement, the Division Manager may authorize that the employee receive full or partial pay and benefits for the period of the suspension.

9.6 Demotion

If a permanent employee is not performing up to standard, he may be demoted to a lower classification.

DISCIPLINARY ACTION

10.1 Demotion, Suspension, Termination

An employee may be demoted, suspended without pay, or discharged for any reason deemed justifiable for disciplinary action with regard to violation of the established personnel policy, including, but not limited to the following:

a. Violation of City regulations
b. Conviction of a felony or other crimes
c. Insubordination
d. Unsatisfactory work
e. Drinking intoxicants, using narcotics and illegal drugs or being drunk on the job
f. Inattention to duty, such as tardiness, laziness, carelessness and unnecessary breakage or loss of property
g. Disloyalty
h. Dishonesty

i. Falsification of personnel records

j. Political violations

k. Payment or acceptance of payment for promotions or positions

l. Physical inability to perform duties required of an employee

10.2 Warning

An employee's Supervisor will, from time to time, talk with him regarding his progress, ambition, and performance. Counseling will be provided on a timely basis whenever an employee's performance is either commendable or deficient. Written "summaries" will be made of such counseling incidents and held for reference in preparing the probational or regular service evaluation. When a person working with and counseling an employee indicates that the overall performance of an employee is not meeting performance

standards and that his evaluation at the time of his six month probational or regular service evaluation unquestionably will be below "average" unless noticeable improvement takes place, an employee will be notified of this eventuality at least three months before the evaluation is due, or thereafter if a problem should later develop. The person-to-person notification will be confirmed with a written Warning Notice, the original of which shall be handed to the employee concerned, one copy, signed by the employee, retained by the Division Manager, and one copy, signed by the employee, placed in the employee's personnel folder. The Warning Notice will inform the employee specifically of the following:

a. How the employee's performance fails to meet requirements

b. What must be done to improve the employee's performance

c. That the employee has an opportunity to improve

d. That the Supervisor and perhaps others in the City are available and willing to give assistance and further training if necessary

e. That the employee will receive an "unsatisfactory" summary evaluation if his performance does not improve sufficiently to meet average requiredments.

10.3 Grievance Committee and Procedure (See pages 37 through 40 in back of Employee Handbook.

A FINAL NOTE

The information in this booklet is extensive and should give an employee a good understanding of his responsibilities and the responsibilities of the City of Florence, as well as City policies and procedures. From time to time new

administrative and personnel policies may be developed. Copies of these policies will be sent to all Supervisors, Division and Department Managers when they are issued and these supervisors and managers will be responsible for keeping all employees so informed.

This booklet should be kept in a special place for future reference. If there are questions regarding anything contained herein, Supervisors, Department or Division Managers should be consulted.

CONFLICT

These rules and regulations shall supplement and supersede all previous rules and regulations relating to the same subject. All conflicting rules and regulations are hereby repealed.

GRIEVANCE PROCEDURE

CITY OF FLORENCE

1978

PURPOSE

The Grievance Procedure of the City of

Florence was adopted to assure all City employees that any just grievance may

1. be recognized
2. receive fair and impartial treatment and
3. be expeditiously resolved as close to the point of origin and as objectively as possible.

THE GRIEVANCE COMMITTEE

1. a. The Grievance Committee is composed of nine members who are appointed by the City Manager: Three of the members are appointed at the supervisory level and six at the non-supervisory level.

   b. All members of the Grievance Committee shall be selected on a broadly representative basis from among the City's personnel with the provision that, whenever a grievance comes before the Committee directly involving a Committee member, such member

shall be disqualified from participating in the hearing.

2. a. Members shall serve 3-year staggered terms except that the members appointed initially shall be appointed so that terms will be staggered and one-third of the terms shall expire each year. Any interim appointment to fill a vacancy for any cause prior to the completion of his term shall be for the unexpired term. Any member may be reappointed for succeeding terms at the discretion of the City Manager.

b. The City Manager shall have the authority to replace any member of the Grievance Committee for any reason deemed advisable or necessary.

3. A quorum shall consist of at least two-thirds of the Committee members, and no hearings may be held without a quorum.

RESPONSIBILITIES OF GRIEVANCE COMMITTEE MEMBERS

The Committee members choose a Chairperson, Co-chairperson and Secretary from among themselves.

Chairperson

The responsibilities of the Chairperson are as follows:

1. preside over all meetings,
2. contact all Grievance Committee members and establish dates for hearings,
3. notify Division Managers and the Personnel Director of the dates of grievance hearings,
4. make certain that all witnesses, pertinent files, records, papers and other sources of information are presented as required to ensure fair and equitable hearings,
5. advise City Manager of Committee findings.

Co-Chairperson

In the absence of the Chairperson, the Co-Chairperson shall assume the responsibilities of the Chairperson.

Secretary

1. The Secretary shall keep an attendance record on all Committee members and any others present at a hearing.
2. Minutes of the proceedings shall be taken at each hearing and a copy filed with the City Manager.
3. The Secretary shall advise the chairman one month prior to the expiration of any Committee member's term.

Other Grievance Committee Members

Grievance Committee members are responsible as follows:

They are responsible for objectively reviewing all of the facts and upholding justice at hearings by voting and making decisions according to their best knowledge,

information and belief.

Personnel Director

The Personnel Director shall be responsible as follows:

1. for accepting all grievances filed,
2. for sending a copy of the grievance filed to the Chairman of the Grievance Committee and the Division Manager concerned,
3. for aiding a person in the writing of a grievance if assistance if required or requested.

DEFINITION

A "grievance" insofar as this Grievance Procedure Manual is concerned, is herein defined as any cause of distress arising out of, or in conjunction with job related activities affording reason for complaint or resistance by an employee. Grievances are basically of two types:

1. Those resulting from action of management, such as dismissal, demotion or suspension.

2. Those resulting from dissatisfaction with some phase of work, relationships with others on the job, or some management decision affecting a job.

As required by South Carolina law, all such matters of employee dissatisfaction may be appealed through the City of Florence' Grievance System with the exception of matters pertaining to compensation. Alleged inequities in compensation shall be resolved at the department or division level. For example, the level of pay of an employee cannot be appealed through the City Grievance Committee, however, a shortage in pay could be appealed through the Grievance Procedure.

PROCEDURE

Step 1: Line of Authority

An aggrieved employee must personally present his grievance to his immediate Supervisor. If a grievance matter cannot be resolved at the Supervisory level, an employee should follow the "Chain of command", i.e.,

discuss it with his Department Manager and then the Division Manager. As a last resort, he should submit to the Personnel Director a written request for a hearing before the Grievance Committee. The request shall include an outline of the data supporting his grievance. The Personnel Director in turn, shall be responsible for notifying the Grievance Committee and Division Manager concerned.

If the grievance has to do with a matter affecting his employment status (such as suspension, demotion, or termination) he has five (5) days from the date on which such action was taken to file a grievance with the Personnel Director.

Step 2: Hearing and Appearance

Within ten days of receipt of a grievance hearing request, the Committee chairman shall schedule the requested hearing and so notify the Grievance Committee, the employee requesting the hearing, and the Division Manager concerned.

The person whose grievance is being heard shall appear before the Grievance Committee on the scheduled date and state his complaint as clearly and concisely as possible. He may also be asked to answer questions pertaining to the matter.

Step 3: Decision

The Grievance Committee, after having heard the testimony and after having evaluated all the facts at hand, shall vote to recommend whatever corrective measures are deemed advisable.

The Committee shall, within twenty days after hearing an appeal, make its findings and decision and report such findings and decision to the City Manager.

If the City Manager approves, the decision of the Grievance Committee shall be final, and copies of the decision shall be transmitted by the Committee to the employee, to the City Manager and to the particular Division Manager involved. If however, the City Manager rejects the decision of the

Committee, he shall make his own decision and that decision shall be final, with copies transmitted to the employee and the employing agency.

APPENDIX E

Verbatim excerpts from Transcript of Record.

Testimony of Miriam Dew, the Petitioner:

(Tr. 41-5) Q. When we appeared at the hearing, was any request made about appearing when witnesses were called and cross-examined?

A. Yes. Well, you requested that Mr. Jeffords point out that that was not our standard procedure; that only on one other occasion did he recall when an attorney had appeared in behalf of a person who had filed a grievance and that although you were welcome to be there with me, at the time that witnesses appeared that we were asked to leave, and that was the standard procedure.

Q. After the city's witnesses were called, did they permit you to come in, you and your attorney?

A. Yes.

Q. Was any request again repeated for an opportunity to cross-examine these

witnesses?

A. Yes, at that time you requested it.

Q. Were any of the witnesses ever produced for cross-examination?

A. No. We didn't even know who they were except the ones we saw who came out through the city manager's office. There was another door, apparently.

Q. Did we miss some of the witnesses?

A. Yes, we did. We discovered who they were later but at that time, we didn't know.

THE COURT: Are you testifying that you and Mr. Dusenbury were permitted to appear and be present when the City's witnesses testified before the grievance committee?

A. We were not.

THE COURT: You were not?

Q. When were we allowed into the grievance committee hearing?

A. I testified first and then you and I left after you made some statements,

then the city manager, apparently, or whoever, went in and they were in there for about three hours, I think, and then they all left and then we were asked to re-appear and they asked me a few questions.

Q. And did they to some extent summarize some of the statements that the other witnesses had made?

A. I don't recall that they summarized. I remember that you asked them some questions and I asked if some of them -- I don't really remember. I remember that we weren't aware of what had been said but you could almost kind of draw conclusions from the questions they were asking.

Testimony of William F. Jeffords, Grievance Committee Chairman:

(Tr. 95-16) Q. What procedures did you (the Grievance Committee) rely on?

A. By agreement of the committee, we agreed to have one group in and listen

to their testimony and then have the other group and then call them back if we thought it was necessary. We did not agree to have the two groups in at the same time, if that's what you're asking.

Q. So in effect there was never any cross-examination by the employee of the witnesses testifying for -- well, for her, maybe, but not against her.

A. And vice versa.

Q. And so was the procedure employed in the particular committee hearing on Miss Dew, similar and more or less identical with other committee hearings and procedures?

A. The same except for the presence of a lawyer....

Q. And after Mr. Edwards came in, did he present various witnesses?

A. Yes.

Q. Were either Miss Dew or I present?

A. No.

Q. Was our presence permitted by you all's established procedure?

A. No.

Q. Was there any, so to speak, notice or verbatim specification given to Miss Dew or to me of what these witnesses testified to specifically?

A. Not that I know of.

Q. Did I give you a lawyer's memorandum stating my various views on the constitutional procedures prior to the committee and discuss it with you?

A. You discussed it with me, I don't remember any memorandum.

Q. And, were you informed that cross-examination was a constitutional procedure and the right to confront the witnesses?

A. I was informed of that but I didn't necessarily think it was true....

(Tr. 102-7) Q. Had you ever permitted an attorney to appear during the City's case in trying to uphold the disciplinary

action and cross-examine the city's witnesses?

A. No.

Q. Is there any such -- have you ever been authorized to permit an attorney to appear and cross-examine witnesses by management or whoever ---

A. No, it's never been requested except the conversation you and I had....

(Tr. 105-20) Q. By the way, were these witnesses under oath?

A. No.

Q. And, of course, Mr. Edwards (the City Manager) wasn't under oath.

A. No one was under oath....

THE COURT: Mr. Jeffords, when the witnesses were called by the City or by Mr. Edwards, neither Miss Dew nor Mr. Dusenbury were permitted to be present while those witnesses gave their statements to the grievance committee, is that the statement that you make?

A. Yes, sir.

THE COURT: And you, under the procedure that you followed, would not permit them to be present at that time.

A. That's right.

(Tr. 256-21) Testimony of Mr. Edwards:

Q. Did you present the letter --- (of Jeanie Griffin, an absent witness)?

A. It was presented to them (the Grievance Committee) at the very close of it, admitting that she was not here to testify, that they may or may not consider it. Those were basically my words in presenting it to them, but I wish to submit it to the grievance committee.

Q. And did you submit it?

A. I did.

Q. What did you (the City Manager) tell the Committee?

A. I basically recapped and presenting the witnesses, their testimony, letting them

testify to their knowledge, and presented one witness related to organizational structure as more or less a qualified person to so testify to support my position as far as the role of an administrative assistant, their relationship to the manager, and used my own comments in summarizing and pointing out those items that had occurred and the reasons for dismissal.

Q. And you, of course, again recommended dismissal or reaffirmed your statement of dismissal?

A. I was there to certainly defend the position of the city manager's office in dismissing her and presented giving what we had to the best of our ability to present to the grievance committee.

Q. And you appeared there in the position of an adversary to Miss Dew?

A. Adversary, not knowing how you mean it, I appeared to present our case. If that's an adversary, yes.

Q. And trying to get the grievance committee to affirm your termination?

A. I'm not sure if you're reading anything into it, but on a simple type statement, yes.

Q. Did you have any idea what you would do if they voted to recommend to reinstate her?

A. Not at that time, I did not, sir.

Q. You had a completely open mind.

A. I had an open mind and a conflict as to what might ultimately be, etcetera, and at that time had not made any pre-determination.

Q. I just wonder what thoughts went through your mind as you decided to testify personally before this committee? Did you give that any thought?

A. As to what went through my mind?

Q. Yes, knowing that you were going to ultimately have to determine whether you would approve the action of the committee.

A. I'm not sure that I understand you.

Q. Were you aware of any conflict of interest, any conflict of roles?

A. I was not aware of any. I was aware of the fact that we were operating as far as we could tell, basically to the letter of the State Code and the Codes of the City of Florence, or ordinances or policies of the City of Florence.

Q. And what did the State Code tell you about whether or not you should appear before the committee?

A. Whether I should appear before the committee, I don't think it even alludes to that, counsel.

Q. Did your handbook have any provision that might cover that?

A. If there are any provisions with reference to the city manager appearing before the grievance committee, I personally am not aware of it at this time.

Q. Certainly under the general category of fair treatment at all times, did you figure it was fair for the city manager to appear before the grievance committee in person on this when you were going to pass on it?

A. Well, I think there was no one else in a position to present it. I don't think I had a choice as to whether to present it or not.

Q. Did you ever consider disqualifying yourself and letting or designating some other adjudicating officer to make any decision?

A. Decision or presentationn to the committee?

A. Well, either the presentation to the committee -- by the way, you could have done it by letter, couldn't you?

A. Well, we have to separate the two before I can give you an answer on that.

Q. Let's go to the letter. Couldn't you have just sent a letter in like Miss Griffin did?

A. To appear before the committee?

Q. Yes.

A. As a matter of choice, I guess I could. There was nothing, in my opinion, that compelled or indicated that I should do this.

Q. Did you actually present the witnesses and ask them questions?

A. Yes sir.

Q. Did you make any closing statements to the committee as to what you thought their action should be?

A. I certainly made a summary statement and as my opening remarks reflected, they were in a very difficult position, that I understood their position, and certainly felt that they had a difficult decision to make and certainly do it without regard to the fact that I was city manager of the City of Florence.

Q. Were you aware at the time that I had requested permission to appear and cross-examine you and other witnesses?

A. I heard some discussion through our city attorney in reference to this, but had not discussed this with the members of the grievance committee chairman.

Q. Was any notice given to Miss Dew of which witnesses were being presented as they were brought in?

A. No, sir.

Q. Was Miss Dew or anybody representing her, an attorney in the committee room to cross-examine any of these witneeses.

A. No sir.

Q. And did she have any assistance of counsel during that stage of the proceeding?

A. You mean as far as representation from you?

Q. Yes, sir.

A. No sir.

Q. And, of course, she obviously was not there to confront the witnesses herself, personally, and test their credibility, was she?

A. Correct.

Q. In the preliminary process of terminating Miss Dew, did you consider yourself bound by or constrained by the provisions of the employee handbook?

A. As interpreted, yes.

Q. How about the provisions just as they're flat stated?

A. Well, here, again, I think it would depend upon the interpretation, possibly, in some instances, and stated in the handbook in the very opening page or two, that the city manager shall be responsible for the implementation and interpretation of the policies contained herein, or something to that affect.

Q. And, of course, the provisions themselves are controlling, not necessarily your interpretation?

A. If no interpretation or clarification is needed, yes, sir.

Q. And it provides, of course, that in dismissing employees, the city manager and division heads and all have authority to dismiss?

A. Correct.

Q. I believe under Section 9.4, page 25, may be dismissed, I'm leaving some other out, by the city manager. And in that same or

immediately -- Chapter 10, Section 10, disciplinary action, which follows the authority of the city manager to terminate, there is a disciplinary action section 10.0. Did you feel yourself subject to those provisions?

A. As interpreted, yes.

Q. Going to 10.2 as to warnings, did you feel yourself bound by the provisions there as to warnings to an employee about to be terminated?

A. As interpreted and upon the advice of the city attorney, yes.

APPENDIX F

QUESTIONS ARGUED IN SOUTH CAROLINA SUPREME COURT APPEAL

Respondent's Questions

1. Did the Trial Court err in holding that the City of Florence had failed to comply with its own regulations and procedures as set forth in Section 10.2 and 10.3 of the City of Florence Employee Handbook and, especially, in view of the fact that the Court had determined that Ms. Dew, the Respondent, was not deprived of a "liberty" interest or possessed of a "property" interest, which under the line of authorities would entitle her to invoke the constitutional safeguards of due process?

2. Notwithstanding the fact that Respondent's employment with the City of Florence was "at will," were not the Respondent's disparaging remarks about the City Manager of such a nature

unequivocally empowering and justifying the City Manager to dismiss the Respondent pursuant to Section 5-13-90 of the Code of Laws of South Carolina, 1976, as amended?

3. Did the Trial Court err in its finding that the City of Florence failed to conform substantially to the guidelines set forth in Section 8-17-110, et seq., of the Code of Laws of South Carolina, 1976, relating to Grievance Procedures?

Petitioner's Questions

1. Was Respondent denied due process because Appellants failed to comply with the mandates of their own procedures?

2. Did Respondent have an "expectancy of employment" that amounted to a "property" interest entitled to protection?

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, hereby certifies that on the 23rd day of August, 1983, three copies of Petitioner's Petition for writ of certiorari were served upon counsel for Respondent by mailing the same to James R. Bell, Esquire, Attorney at Law, Post Office Box 5060, Florence, South Carolina 29502.

Richard G. Dusenbury

Richard G. Dusenbury
Attorney for Petitioner